Supreme Court of the United States

OCTOBER TERM, 1968

No. 463

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

WYMAN-GORDON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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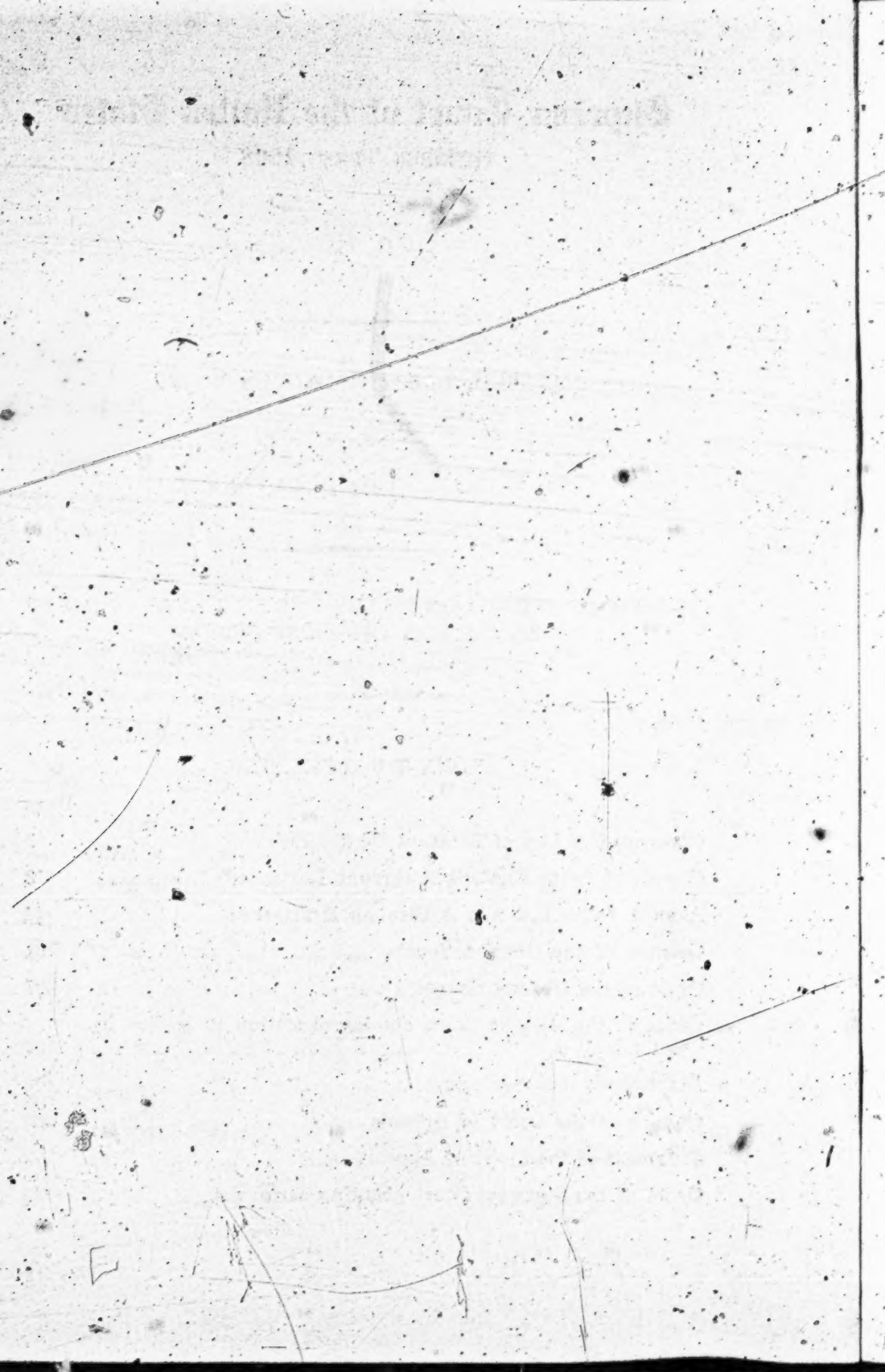

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 463

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

WYMAN-GORDON COMPANY

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

7.12.66	Representation petition filed.
9.16.66	Regional Director's decision and direction of election issued.
10.19.66	Regional Director's supplemental decision issued setting aside election and directing second election.
10.26.66	Employer's request for review filed.
11.16.66	Board's order denying employer's request for review of Regional Director's supplemental decision.
12.27.66	Subpena duces tecum issued.
12.30.66	Employer's motion to revoke subpena filed.
1.10.67	Board's order denying employer's motion to revoke subpena issued.
3.27.67	Complaint filed.
4.18.67	Answer filed.
6.30.67	Garrity, J. Opinion issued.
7.19.67	Garrity, J. order dated July 17, 1967 entered. ". . . Defs to comply with pltf's subpena, etc. . . ."

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES (Continued)

7.25.67	Defendant's motion for stay of execution pending appeal, filed.
7.26.67	Plaintiff's Assent to Defendant's motion to stay, filed on copy of motion.
7.26.67	Garrity, J. Order staying execution on motion by defendant, entered.
7.28.67	Defendant's notice of appeal, filed.
6.12.68	Opinion of U. S. Court of Appeals for the First Circuit, issued.
6.12.68	Judgment of U. S. Court of Appeals for the First Circuit, entered.
11.12.68	Order granting certiorari, issued.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 67-260 G.

NATIONAL LABOR RELATIONS BOARD, *Plaintiff*,

v.

WYMAN-GORDON COMPANY and JAMES W. STODDARD as President of Wyman-Gordon Company, *Defendants*.

COMPLAINT.

[Filed March 23, 1967.]

COUNT I

Plaintiff for a first count alleges:

1. Plaintiff is an administrative agency created by the National Labor Relations Act, referred to hereafter as "the Act" (29 U.S.C., Sec. 151, *et seq.*), and is empowered and directed to administer the provisions of the Act, including the investigation of questions of employee representation under Section 9 (29 U.S.C., Sec. 159).

2. Defendant James W. Stoddard is the president of Wyman-Gordon Company. Defendant Wyman-Gordon Company is an employer engaged in the manufacture and sale of products for interstate commerce within the meaning of Section 2(6) and (7) of the Act (29 U.S.C., Sec. 152(2) and (7)).

3. Jurisdiction is conferred on this Court by Section 11(2) of the Act (29 U.S.C., Sec. 161(2)), giving the District Courts jurisdiction to issue orders, upon application of the Board, to enforce subpenas issued by the Board.

4. The defendants' plants involved in this judicial proceeding are located at Worcester, North Grafton and Millbury, Massachusetts, within this judicial district.

5. On July 12, 1966, a labor organization (International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO) filed a petition with the Board's First Region at Boston, Massachusetts asserting its claim to represent the Company's production and maintenance employees, and seeking a representation election to establish its majority support. A copy of the petition is attached hereto as Exhibit A.

6. The proceeding instituted by the petition is known on the records of the Board as Case No. 1-RC-9073.

7. Another labor organization (United Steelworkers of America, AFL-CIO) intervened in the representation proceeding to compete with the petitioning union for the employees' support.

8. On September 6, 1966, the Board's Regional Director for the First Region issued a Decision and Direction of Election in the proceeding, pursuant to Section 9(c)(1) of the Act (29 U.S.C., Sec. 159 (c)(1)). A copy of the Decision and Direction of Election is attached hereto as Exhibit B.

9. In his Decision and Direction of Election, the Regional Director directed that an election be held in a unit of approximately 1,750 production and maintenance employees at the Company's Worcester, North Grafton and Millbury, Massachusetts, plants (Exhibit B).

10. The Regional Director further directed the defendant Company (Exhibit B, n. 3) to furnish an election eligibility list containing the names and addresses of all the employees eligible to vote, in accordance with the election rule announced by the Board on February 4, 1966, in its decision in Excelsior Underwear, Inc., et al., 156 NLRB No. 111. A copy of the Board's decisions in the *Excelsior* case is attached hereto as Exhibit C.

11. Under the Board's *Excelsior* rule an employer is required to file with the Board's Regional Director, in the Region where the representation proceeding is pending, a list of the names and addresses of all employees eligible to vote in the representation election within 7 days after the issuance of a Decision and Direction of Election or after the close of the determinative payroll period for eligibility purposes, whichever is later (Exhibit C, p. 5).

12. The *Excelsior* rule further provides that the Regional Director is then to make the list of employee names and addresses available to all parties to the representation proceeding in order to promote the communication of election issues to the employees and to aid in challenging the ballots of employees believed to be ineligible to vote (Exhibit C, pp. 6-10).

13. On September 13, 1966, the Company notified the Regional Director that it would not furnish the eligibility list required by the election rule promulgated in *Excelsior*.

14. On September 29, 1966, an election was conducted in which 226 employees cast valid ballots for the petitioning union (Boilermakers), 555 cast valid ballots for the intervening union (Steelworkers) and 903 employees voted against representation by either union. The Board, however sustained the intervening union's objection to conduct affecting the results of the election based on the Company's failure to furnish the *Excelsior* list set the election aside, and directed a second election. Copies of the Regional Director's report on the election and the Board's order affirming the report are attached hereto as Exhibits D and E.

15. On December 2, 1966, the Regional Director notified the Company that the second election was to be conducted on December 29, 1966, and requested that an election eligibility list of employee names and addresses be filed not later than December 9, 1966, as required by the Board's order and the *Excelsior* rule. A copy of the Regional Director's notice is attached hereto as Exhibit F.

16. The Company again failed to furnish the election eligibility list.

17. Thereafter the unions notified the Regional Director that they do not want to proceed to an election until the Company furnishes the required eligibility list in compliance with the Board's *Excelsior* rule. Accordingly the second election was postponed.

18. The Regional Director caused a subpena *duces tecum* to be issued on December 27, 1966, pursuant to Section 11(1) of the Act (29 U.S.C., Sec. 161(1)), directing defendant James W. Stoddard, president of the Company to produce and make available to the Board's Regional

Office the Company's personnel and payroll records, or an eligibility list in lieu thereof, setting forth the names and addresses of all employees eligible to vote in the election. A copy of the subpena is attached hereto as Exhibit G.

19. The subpena was served upon defendant James W. Stoddard by certified mail on December 28, 1966. (Exhibit G, p. 2).

20. On December 30, 1966, the Company filed a motion to quash the subpena which was denied by the Board by formal telegraphic order issued on January 10, 1967. Copies of the motion to quash and of the order denying the motion are attached hereto as Exhibits H and I.

21. Nonetheless, defendant James W. Stoddard as president of the Company failed and refused and continues to fail and refuse to produce the records and documents called for by the subpena.

22. Defendant Stoddard's refusal to comply with the subpena constitutes contumacious conduct within the meaning of Section 11(2) of the Act (29 U.S.C., Sec. 161(2)).

COUNT II

In the alternative, and for a second count, plaintiff alleges:

1. Plaintiff now pleads as part of this count, and as if fully set out here, paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of Count I.

2. Jurisdiction is conferred on this Court by 28 U.S.C., Sec. 1337, giving the District Courts original jurisdiction "of all suits and proceedings under any law regulating commerce," without regard to citizenship of the parties or the sum or value in controversy, and by Section 9(c) of the Act (29 U.S.C., Sec. 159(c)).

3. Section 9(c) of the Act authorizes the Board, in furtherance of the broad Congressional purpose of promoting the free flow of commerce, to conduct an investigation upon the filing of a valid representation petition and, if the Board finds that a question of representation exists, to direct an election by secret ballot and certify the results.

4. The Board was acting within its statutory authority in establishing the election rule announced in its *Excelsior* decision.

5. The Company's refusal to comply with the Board's election rule has impeded and continues to impede the Board in resolving the question of representation before it in this case, and has prevented and continues to prevent the Board from conducting a fair and free election in accordance with the policy of the Act set forth in Section 1 and the Board's functions and duties specified in Section 9(c) (29 U.S.C., Secs. 151 and 159(c)).

Wherefore, plaintiff, the National Labor Relations Board, respectfully prays:

(a) That an order to show cause issue forthwith directing defendants to appear before this Court on a day certain to be fixed in said order, and to show cause, if any, why an order should not issue directing defendant James W. Stoddard to comply with the subpena, or, in the alternative, directing the defendant Company to comply with the valid election rule announced by the Board in its *Excelsior* decision;

(b) That upon the return of said order to show cause, an order issue enforcing the subpena or directing the defendant Company to file with the Regional Director a list of the names and addresses of all employees eligible to vote in the election directed by the Board in Case No. 1-RC-9073.

(c) That plaintiff, the National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated this 23d day of March, 1967.

ROBERT E. GREENE
Regional Attorney
National Labor Relations Board
Region 1

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

CASE NO 1-RC-9073

DATE FILED July 12, 1966

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)*

(Check one)

X ☐ RC-CERTIFICATION OF REPRESENTATIVES—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

☐ RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

☐ RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

☐ UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

☐ UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees: *(Check one)* ☐ In unit not previously certified ☐ In unit previously certified in Case No. _____

☐ AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER	EMPLOYER REPRESENTATIVE TO CONTACT	PHONE NO
Unean-Gordon Company	Robert W. Stoddard, Pres.	

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED *(Street and number, city, State, and ZIP Code)*

105 Madison Street, Worcester, Massachusetts

4a. TYPE OF ESTABLISHMENT *(Factory, mine, wholesaler, etc.)*	4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE
Factories	Metal forgings, etc.

5. Unit Involved *(In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)*

Included All production and maintenance employees including power plant, leaders, hourly rated laboratory employees and model makers employed by the Employer at its Worcester, Mass. and North Grafton, Mass. plants who were employed during the payroll period for the week ending June 12, 1965.

Excluded Office clerical employees, plant clerical employees, guards and watchmen, salaried laboratory and engineering employees, time-keepers, time study employees, hourly paid engineers, cafeteria employees, professional employees, dispatchers, assistant foremen, working foremen and all supervisors as defined in the Act.

6a. NUMBER OF EMPLOYEES IN UNIT: (approx.)
PRESENT 1600
PROPOSED (BY UC/AC)

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?* ☐ YES ☐ NO
*Not applicable in R.M. UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. ☐ Request for recognition as Bargaining Representative was made on _____ *(Month, day, year)* and Employer declined recognition on or about _____ *(Month, day, year)* *(If no reply received, so state)*

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*

NAME	AFFILIATION
none	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY *(Show month, day, and year)*	10. IF YOU HAVE CHECKED BOX UD IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP *(Month, day, and year)*

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES ____ NO X	11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF _____ *(Insert name)* A LABOR ORGANIZATION, OF _____ *(Insert address)* SINCE _____ *(Month, day, year)*

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE.)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM *(Required only if Petition is filed by Employer)*
none			

☐ RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

☐ UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

☐ UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees: *(Check one)* ☐ In unit not previously certified ☐ In unit previously certified in Case No. _____

☐ AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER	EMPLOYER REPRESENTATIVE TO CONTACT	PHONE NO
Unsan-Gordon Company	Robert W. Stoddard, Pres.	

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED *(Street and number, city, State, and ZIP Code)*

105 Malicon Street, Worcester, Massachusetts

4a. TYPE OF ESTABLISHMENT *(Factory, mine, wholesaler, etc.)*	4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE
Factories	Metal forgings, etc.

5. Unit Involved *(In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)*

Included All production and maintenance employees including power plant, leaders, hourly rated laboratory employees and model makers employed by the Employer at its Worcester, Mass. and North Grafton, Mass. plants who were employed during the payroll period for the week ending June 12, 1965.

Excluded Office clerical employees, plant clerical employees, guards and watchmen, salaried laboratory and engineering employees, time-keepers, time study employees, hourly paid engineers, cafeteria employees, professional employees, dispatchers, assistant foremen, working foremen and all supervisors as defined in the Act.

(If you have checked box RC in 1 above, check and complete EITHER item 6a or 6b, whichever is applicable)

6a. NUMBER OF EMPLOYEES IN UNIT:
(approx.)
PRESENT 1600
PROPOSED (BY UC/AC)

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?
☐ YES ☐ NO
*Not applicable in R.M. UC, and AC

7a. ☐ Request for recognition as Bargaining Representative was made on _____ *(Month, day, year)* and Employer declined recognition on or about _____ *(Month, day, year)* *(If no reply received, so state)*

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*

NAME	AFFILIATION
none	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY *(Show month, day, and year)*	10. IF YOU HAVE CHECKED BOX UD IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP *(Month, day, and year)*

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES ..... NO X	11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF _____ *(Insert name)* A LABOR ORGANIZATION, OF _____ *(Insert address)* SINCE _____ *(Month, day, year)*

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE.)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM *(Required only if Petition is filed by Employer)*
none			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO
(Petitioner and affiliation, if any)

/s/ Vincent J. Curran ..... Int'l. Representative
(Signature of representative or person filing petition) *(Title, if any)*

Address 1 Cumberland Street, Worcester, Massachusetts ..... *(Street and number, city, State, and ZIP Code)* *(Telephone number)*

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 834-[illegible]

cc: Russell K. Berg, 570 New Brotherhood Building, Kansas City, Kansas 66101
Charles F. Moran, I. V. P., 25 West 45th Street, Rm. 1203, New York, [illegible]

EXHIBIT A.

8

EXHIBIT B.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WYMAN-GORDON COMPANY

Employer

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Petitioner

Case No. 1-RC-9073

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.[1]

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

[1] United Steelworkers of America, AFL-CIO was permitted to interevene at the hearing on the basis of a showing of interest.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[2]

All production and maintenance employees including power plant employees, cafeteria employees, leaders, hourly-rated laboratory employees, and model makers, employed by the Employer at its Worcester, North Grafton, and Millbury, Massachusetts plants, but excluding office clerical employees, plant clerical employees, salaried laboratory and all engineering employees, time keepers, time study employees, professional employees, guards and watchmen, dispatchers, assistant foremen, working foremen, and all supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated

[2] The unit, as amended at the hearing, is in accord with the stipulation of the parties. The Employer is engaged in the manufacture, sale, and distribution of metal forgings and related products at its Worcester, North Grafton, and Millbury, Massachusetts plants where it employs 17,050 persons in the unit found appropriate herein.

before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[3] Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO; or by United Steelworkers of America, AFL-CIO; or by Neither

/s/ ALBERT J. HOBAN
Regional Director, Region 1

Dated September 6, 1966 at Boston, Massachusetts

[3] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, on or before Sept. 13, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB No. 111.

EXHIBIT C.

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156 NLRB No. 111

D-8291
Saluda, S. C.
and Long Beach, Calif.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCELSIOR UNDERWEAR INC. and SALUDA KNITTING INC.
Employer [1]

and

Case No. 11-RC-1876

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO
Petitioner

K. L. KELLOGG & SONS Employer [2]

and

Case No. 21-RC-8955

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 3, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, AFL-CIO
Joint Petitioners

DECISIONS AND CERTIFICATIONS OF RESULTS OF ELECTIONS

In the *Excelsior* case, pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted by the Regional Director for Region 11 on December 6, 1963, among the employees in the unit

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[1] Referred to herein as the *Excelsior* case.

[2] Referred to herein as the *Kellogg* case.

described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 247 eligible voters, 246 cast ballots, of which 35 were for, and 206 against, the Petitioner, and 5 challenged. The challenges were insufficient in number to affect the results of the election. The Petitioner filed timely objections to conduct affecting the results.

The objections, as summarized by the Regional Director, related to the following:

(1) The Employer's conduct on November 29 in mailing to all employees an 8-page letter allegedly containing material misstatements as to Union dues and initiation fees, as well as provisions of the National Labor Relations Act, threats of plant closings, strikes and violence, and a predetermined position of refusing to bargain in the event the Union were to be selected as bargaining representative.

(2) The Employer's conduct in refusing to supply the Union with a list of employees and their addresses for the purpose of allowing the Union to answer the letter referred to in Objection No. 1.

(3) The Employer's conduct on or about December 4, in posting a notice at its plants materially misrepresenting Union officials' salaries.

(4) The Employer's conduct on December 5, in giving a speech to employees on Company time containing promises of benefit if the employees did not select the Union as their bargaining representative.

(5) The conduct of certain townspeople of Saluda, South Carolina, in speaking to groups of employees on December 3 and 4, and informing them that other companies interested in relocating in Saluda, South Carolina, would not do so if the Union were selected as bargaining representative. Said townspeople allegedly also stated that Union representatives were Communistic and did not believe in God.

After investigation, the Regional Director, on January 10, 1964, issued and served upon the parties his Report

and Recommendation on Objections, in which he recommended that the objections be overruled and that a certification of election results be issued. Petitioner filed timely exceptions to the Regional Director's report.

In the *Kellogg* case, pursuant to a Stipulation for Certification upon Consent Election, a mail election by secret ballot was conducted by the Regional Director for Region 21 between May 15, 1964, and May 28, 1964, among the employees in the unit described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 81 eligible voters, 30 cast votes, of which 9 were for, and 21 against, the Joint-Petitioners. The Joint Petitioners filed timely objections to conduct affecting the results of the election.

Objection No. 1 alleged that the Employer, on or about May 5, 1964, and May 13, 1964, sent to each employee letters containing certain false and coercive material. Objection No. 2 complained of the Employer's denial of the Joint-Petitioners' request for a list of employees' names and addresses so that it would have an opportunity to mail campaign material to those employees.

After investigation, the Regional Director, on July 16, 1964, issued and served upon the parties his Report and Recommendation on Objections, in which he recommended that Objection No. 1 be sustained, Objection No. 2 be overruled, and the election be set aside and a new election directed. The Joint-Petitioners filed timely exceptions to the Regional Director's recommendation that Objection No. 2 be overruled.[3]

On April 2, 1965, the National Labor Relations Board, having determined that the Employers' denial of the Petitioners' request for the names and addresses of employees eligible to vote in the elections in these two cases presented a question of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that the two cases be consolidated, and that oral argument be heard before the Board on May 20, 1965. The parties were given permission to file further briefs

---

[3] The Employer filed timely exceptions to the Regional Director's recommendation with respect to Objection No. 1.

and directed to focus their attention, in briefs and argument, on the following questions:

I. Can a fair and free election be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefor?

II. If such information should be made available, should the requirement be limited to situations in which the employer has utilized his knowledge of these names and addresses to mail antiunion letters or literature to employees' homes?

III. If some requirement that the employer make addresses available is to be imposed, how should this be implemented? For example, should such names and addresses be furnished to a mailing service with instructions to mail, at the union's expense, such materials as the union may furnish? Or, should the union be entitled to have the names and addresses?

The Board also invited certain interested parties to file briefs *amicus curiae* and to participate in oral argument. This invitation was accepted by: the Chamber of Commerce of the United States; American Federation of Labor-Congress of Industrial Organizations; International Union of Electrical, Radio and Machine Workers, AFL-CIO; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO. The National Association of Manufacturers, Retail Clerks International Association, AFL-CIO, and Textile Workers Union of America, AFL-CIO, filed briefs but did not participate in the argument. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America participated in the argument but did not file a brief.

Upon the entire record in each of these cases, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner (Joint-Petitioners in *Kellogg*) is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4(a) In *Excelsior* the parties stipulated, and we find, that all production and maintenance employees, plant clerical employees, and janitors at both the Employer's plants in Saluda, South Carolina, excluding all office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) In *Kellogg* the parties stipulated, and we find, that all drillers, derrickmen, rotary helpers, yardmen, mechanics, and welders, excluding all office clerical employees, professional employees, truckdrivers, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. Exceptions 1, 3, 4, and 5 in *Excelsior* are without merit and hereby rejected.

6. Objection No. 2 in each of these cases poses the question whether an employer's refusal to provide a union with the names and addresses of employees eligible to vote in a representation election should be grounds on which to set that election aside. The Board has not in the past set elections aside on this ground. For, while the Board has required that an employer, shortly before an election, make available for inspection by the parties and the Regional Director a list of employees claimed by him to be eligible to vote in that election, there has been no requirement that this list contain addresses in addition to names. The rules governing representation elections are not, however, "fixed and immutable. They have been changed and refined, generally in the direction of higher standards."[4]

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[4] *Sewell Manufacturing Company*, 138 NLRB 66, 70. And see, e.g., *Peerless Plywood Company*, 107 NLRB 427; *Gummed Products Co.*, 112 NLRB 1092; *Hollywood Ceramics Co., Inc.*, 140 NLRB 221; *Dal-Tex Optical Co.*, 137 NLRB 1782, at 1786-7.

We are persuaded, for the reasons set out below, that higher standards of disclosure than we have heretofore imposed are necessary, and that prompt disclosure of the information here sought by the Petitioners should be required in all representation elections. Accordingly, we now establish a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties pursuant to Section 102.62 of the National Labor Relations Board Rules and Regulations or after the Regional Director or the Board has directed an election pursuant to Section 102.67, 102.69, or Section 102.85 thereof, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case.[5] Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.[6]

The considerations that impel us to adopt the foregoing rule are these: "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone."[6] In discharging that trust, we

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[5] In the event that the payroll period for eligibility purposes is subsequent to the direction of election or consent-election agreement, the eligibility list shall be filed within 7 days after the close of the determinative payroll period for eligibility purposes. In order to be timely, the eligibility list must be *received* by the Regional Director within the period required. No extension of time shall be granted by the Regional Director except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

However, the rule we have here announced is to be applied prospectively only. It will not apply in the instant cases but only in those elections that are directed, or consented to, subsequent to 30 days from the date of this Decision. We impose this brief period of delay to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated.

[6] *N.L.R.B.* v. *Waterman S. S. Corp.*, 309 U.S. 206, 226; see, also, *N.L.R.B.* v. *Shirlington Supermarkets*, 224 F.2d 649, 651 (C.A. 4).

regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice.[7] Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available.[8] In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.

As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises,[9] has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters.[10] In other words,

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[7] See *General Shoe Corporation*, 77 NLRB 124, 126-127.

[8] See Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 46, 92 (1964).

[9] *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105.

[10] A union that does not know the names or addresses of some of the voters may seek to communicate with them by distributing lit-

by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.

Nor are employee names and addresses readily available from sources other than the employer. The names of some employees may be secured with the assistance of sympathetic fellow employees, but, in a large plant or store, where many employees are unknown to their fellows, this method may not yield the names and addresses of a major proportion of the total employee complement.[11] Additionally, there are not infrequently employees on layoff status, sick leave, leave of absence, military leave, etc., eligible to vote,[12] yet unknown to their fellow employees. Furthermore, employees are frequently known to their fellows only by first names or nicknames, so that there may be significant problems in obtaining the home addresses even of those employees whose names are known. Finally, all the foregoing difficulties are compounded by the more or less constant turnover in the employee complement of any employer.[13]

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erature on sidewalks or street corners adjoining the employer's premises or by utilizing the mass media of communication. The likelihood that *all* employees will be reached by these methods is, however, problematical at best. See *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 130 (C.A. 2), cert. denied 376 U.S. 951. Personal solicitation on plant premises by employee supporters of the union, while vastly more satisfactory than the above methods, suffers from the limited periods of nonworking time available for solicitation (generally and legally forbidden during working time, *Peyton Packing Co.*, 49 NLRB 828, 843) and, in a large plant, the sheer physical problems involved in communicating with fellow employees.

[11] See, e.g., *The May Department Stores Co.*, 136 NLRB 797, 808, enforcement denied, 316 F. 2d 797 (C.A. 6), in which, after some 20 months of organizational effort, the union possessed names and addresses of only 1250 out of approximately 3000 eligible voters.

[12] *Vent Control, Inc.*, 126 NLRB 1134 (layoff); *Otarion Listener Corp.*, 124 NLRB 880 (sick leave); *Channel Master Corp.*, 148 NLRB 1343, (leave of absence); *Brown Cigar Company*, 124 NLRB 1435, 1437, footnote 3, (military leave).

[13] See 88 Monthly Labor Review, 1022-1024 (August 1965).

In sum, not only does knowledge of employee names and addresses increase the likelihood of an informed employee choice for or against representation, but, in the absence of employer disclosure, a list of names and addresses is extremely difficult if not impossible to obtain. Accordingly, as we have stated, we shall in the future regard an employer's refusal to make a prompt disclosure of this information as tending to interfere with prospects for a fair and free election.[14]

A requirement that all participants in an election contest have the opportunity to ascertain the names and addresses of the voters is not uncommon. Lists of registered voters in public elections are open to inspection and copying by the public.[15] When stockholders wish to participate in election contests (or other proxy contests), management either must provide them with the names and addresses of other stockholders or mail campaign

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[14] While we have discussed the importance of disclosure in the context of the typical case in which the employer and union are the parties engaged in communicating with the electorate, it should be noted that the requirement here imposed applies equally to the case in which an election has been directed upon a petition by an employee or group of employees who seek to decertify an existing bargaining representative or to rescind that representative's authority to enter into a union-security agreement of the sort otherwise authorized by Section 8(a)(3) of the Act. In these latter cases, the petitioning employees would be entitled to the names and addresses of their fellow employees as an aid in their efforts to communicate their arguments against continued union representation or continuance of an existing union-security agreement. Similarly, the union, as a party to the election, would be entitled to employees' names and addresses so as to communicate its position. In short, the disclosure requirement here adopted applies whenever a Board election has been scheduled and insures all parties to the election, whatever their viewpoint, of an opportunity to communicate with the electorate. The only exception is in the expedited election conducted pursuant to Section 8(b)(7)(C). In this situation, we believe that the time span between the direction of election and the conduct thereof is too brief, taking into account the time required for the employer to compile and file a list of names and addresses, for the union to be able to make any meaningful use of this information. Hence, in that limited situation, we do not require disclosure.

[15] 29 C.J.S. Elections § 50.

material for them.[16] Any candidate for union office is entitled to have the union distribute his campaign literature to all members.[17]

We see no reason why similar opportunities should not be available in a representation election. As one thoughtful commentator has stated, "Since the opportunity for both sides to reach all the employees is basic to a fair and informed election, the reasons for requiring disclosure seem just as strong as those leading to similar requirements under other provisions of the law." [18]

While the rule we here announce is primarily predicated upon our belief that prompt disclosure of employee names and addresses is necessary to insure an informed electorate, there is yet another basis upon which we rest our decision. As noted (*supra*, 5), an employer is presently under no obligation to supply an election eligibility list until shortly before the election. The list, when made available, not infrequently contains the names of employees unknown to the union and even to its employee supporters. The reasons for this are in large part the same as those that make it difficult for a union to obtain, other than from the employer, the names of all employees, i.e., large plants with many employees unknown to their fellows, employees on layoff status, sick leave, military leave, etc. With little time (and no home addresses) with which to satisfy itself as to the eligibility of the "unknowns", the union is forced either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, as well as the likelihood that the challenges

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[16] 17 C.F.R. 240. 14a-7, 8.

[17] 73 Stat. 532, 29 U.S.C. § 481(c).

[18] Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 99-100 (1964); Cf. Summers, *Judicial Regulation of Union Elections*, 70 Yale L. J. 1221, 1227-1228 (1961). Another manifestation of the concept that all participants in an election should have access to the electorate is embodied in 48 Stat. 1088, as amended, 47 U.S.C. § 315(a), which provides for equal time for political candidates on radio and television.

will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will, we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity. Furthermore, *bona fide* disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significance of a single vote is apt to loom large in the parties' calculations. Thus, the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation.

The arguments against imposing a requirement of disclosure are of little force, especially when weighed against the benefits resulting therefrom. Initially, we are able to perceive no substantial infringement of employer interests that would flow from such a requirement. A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election. Cf. *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing *per curiam*, 235 F. 2d 319 (C.A. 9); *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149; *F.C.C.* v. *Schreiber*, 381 U.S. 279.

The main arguments that have been presented to us by the Employers and the *amici curiae* supporting the Employers relate not to any infringement of *employer* rights flowing from a disclosure requirement but rather to an asserted infringement of *employee* rights. Thus, it is argued that if employees wished an organizing union to have their names and addresses, they would present the

union with that information. By compelling the employer to provide the union with information that the employees have chosen not to divulge, the Board, it is asserted, compels employer interference with the Section 7 right of employees to refrain from union activities. We regard this argument as without merit. An employee's failure to provide a union with his name and address, whether due to inertia, fear of employer reprisal, or an initial predisposition to vote against union representation, is not, as we view it, an exercise of the Section 7 right to refrain from union activity. Rather, in the context with which we are here concerned—a Board-conducted representation election—an employee exercises this right by voting for or against union representation.

Similarly, we reject the argument that to provide the union with employee names and addresses subjects employees to the dangers of harassment and coercion in their homes. We cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy.[19] We do not, in any event, regard the mere possibility that a union will abuse the opportunity to communicate with employees in their homes as sufficient basis for denying this opportunity altogether. See *Martin* v. *City of Struthers*, 319 U.S. 141; *Staub* v. *City of Baxley*, 355 U.S. 313.[20]

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[19] See *Poinsett Lumber & Mfg. Co.*, 116 NLRB 1732; *Orleans Mfg. Co.*, 120 NLRB 630, 634; *Plant City Welding and Tank Company*, 119 NLRB 131, 133-134.

[20] Another argument made against disclosure of employee names and addresses in connection with an election proceeding is that a union might petition for an election with no real intention of participating therein, but solely to obtain employee names and addresses, intending, on receipt thereof, to withdraw the election petition and utilize its newly-acquired information as a basis for further organizational efforts. We think that the likelihood of such misuse of the Board's processes is minimized by our practice of requiring at least a 30 percent showing of representation before further processing the usual RC (union) petition, and also by our practice of imposing (absent a showing of good cause to the contrary) a 6-month ban on entertaining an election petition filed by a union which has withdrawn from an election after a hearing has

The argument is also made (by the Employer in the *Excelsior* case) that under the decisions of the Supreme Court in *N.L.R.B.* v. *Babcock & Wilcox*,[21] and *N.L.R.B.* v. *United Steelworkers (Nutone, Inc.)*,[22] the Board may not require employer disclosure of employee names and addresses unless, in the particular case involved, the union would otherwise be unable to reach the employees with its message. We disagree. We think that the issue presented by these cases is distinguishable from that presented in *Babcock* or *Nutone* and that, even assuming the availability of other avenues by which a union *might* be able to communicate with employees, we may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election.

Initially, as we read *Babcock* and *Nutone*, the existence of alternative channels of communication is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest—such as the employer's interest in controlling the use of property owned by him. Here, as we have shown, the employer has no significant interest in the secrecy of employee names and addresses. Hence, there is no necessity for the Board to consider the existence of alternative channels of communication before requiring disclosure of that information. Moreover, even assuming that there is some legitimate employer interest in nondisclosure, we think it relevant that the subordination of that interest which we here require is limited to a situa-

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been held or a consent-election agreement approved by the Regional Director. See *Campos Dairy Products, Ltd.*, 107 NLRB 715. In any event, in view of the importance of disclosure for a fair and free election, we do not regard the bare possibility that *some* unions may misuse the information disclosed as grounds for our denying *all* unions (as well as employees who seek to unseat unions, see footnote 14, *supra*) access to employee names and addresses.

[21] 351 U.S. 105.

[22] 357 U.S. 357.

tion in which employee interests in self-organization are shown to be substantial. For, whenever an election is directed (the pre-condition to disclosure) the Regional Director has found that a real question concerning representation exists; when the employer consents to an election, he has impliedly admitted this fact.[23] The opportunity to communicate on company premises sought in *Babcock* and *Nutone* was not limited to the situation in which employee organizational interests were substantial, i.e., in which an election had been directed; we think that on this ground also the cases are distinguishable. Finally, both *Babcock* and *Nutone* dealt with the circumstances under which the Board might find an employer to have committed an unfair labor practice in violation of Section 8 of the Act, whereas the instant cases pose the substantially distinguishable issue of the circumstances under which the Board may set aside an election. "[T]he test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)."[24] Whether or not an employer's refusal to disclose employee names and addresses after an election is directed would constitute "interference, restraint, or coercion" within the meaning of Section 8(a)(1) of the Act, despite the existence of alternative channels of communication open to the union, is a question on which we express no view because

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[23] Section 9(c)(1), NLRA; see, also, Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Sec. 101.18, 29 C.F.R. 101.18. We also require disclosure when an election is directed pursuant to an employee petition to decertify a currently recognized union or to rescind the authority of such a union to enter into a "union-shop" agreement. See footnote 14; *supra*. In these situations, the employee interest, though opposed to union representation or membership, is also required to be substantial before an election will be directed. See Section 9(c)(1)(A)(ii), 9(e)(1), NLRA; Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Section 101.18, 101.27, 29 C.F.R. 101.18, 101.27.

[24] *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787; see also *General Shoe Corporation*, 77 NLRB 124, 126-127.

it is not before us. However, we are persuaded, for the reasons previously stated, that disclosure is one of the "safeguards necessary to insure the fair and free choice of bargaining representative by employees" [25] and that an employer's refusal to disclose, regardless of the existence of alternative channels of communication, tends to interfere with a fair and free election. Thus *Babcock* and *Nutone*, which dealt with the substantially different issue of whether the employers' conduct violated Section 8(a)(1), are, for this reason also, inapposite.

Finally, we wish to state our reasons for rejecting the approaches to the disclosure issue suggested by questions II and III in the Notice of Hearing. We do not limit the disclosure requirement to the situation in which the employer has mailed antiunion literature to employees' homes (question II) because we believe that access to employee names and addresses is fundamental to a fair and free election regardless of whether the employer has sent campaign propaganda to employees' homes.[26] We do not limit the requirement of disclosure to furnishing employee names and addresses to a mailing service (question III) because this would create difficult practical problems and because we do not believe that the union should be limited to the use of the mails in its efforts to communicate with the entire electorate.[27]

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[25] *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 330; see also *N.L.R.B.* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226.

[26] Compare *May Department Stores Co.*, 136 NLRB 797, enforcement denied, 316 F. 2d 797 (C.A. 6); *Montgomery Ward & Co.*, 145 NLRB 846, enfd. in part, 339 F. 2d 889 (C.A. 6).

[27] See *S. & H. Grossinger's, Inc.*, 156 NLRB No. 20. See, also, Eldersveld and Dodge, "Personal Contact or Mail Propaganda: An Experiment in Voting Turnout and Attitude Change" in Katz, *Public Opinion and Propaganda*, 532, 541 (1954); Karsh, *Diary of a Strike* 106 (1958); Klapper, *The Effects of Mass Media*, pt. 2, pp. 9-14 (1949).

In the briefs and arguments of the Employers and *amici curiae* supporting the Employers, much has been made of Board decisions setting aside representation elections because an employer or his agents called upon all or a majority of employees in their homes in the period preceding the election. See, e.g., *Peoria Plastic Co.*, 117 NLRB 545. The argument is made that it would be inequitable

Inasmuch as the rule we have here announced is to be applied prospectively only (see footnote 5, *supra*), we reject Petitioners' exceptions to the Regional Directors' recommendations with respect to Objection No. 2 in both *Kellogg* and *Excelsior*. As we have also rejected the Petitioner's remaining exceptions in *Excelsior*, we shall accept the Regional Director's recommendation and certify the results of that election. With respect to *Kellogg*, while we have rejected the Joint Petitioners' exception to the Regional Director's recommendation as to Objection No. 2, the Employer has filed exceptions to the Regional Director's recommendation that the election be set aside on the basis of two campaign letters sent by the Employer and that a new election be directed. We have read the letters of the Employer in their entirety and the Union's propaganda and conclude that, under all the circumstances, the Employer's letters could clearly be evaluated by the employees as partisan electioneering and do not warrant setting the election aside.[28] Accordingly, we shall also certify the results of that election.

CERTIFICATIONS OF RESULTS OF ELECTIONS

IT IS HEREBY CERTIFIED, in *Excelsior Underwear Inc. and Saluda Knitting Inc.*, Case No. 11-RC-1876, that a majority of the valid ballots has not been cast for Amalgamated Clothing Workers of America, AFL-CIO, and that the said labor organization is not the exclusive representative of the employees in the unit herein found appropriate, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

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for the Board to preclude employers from visiting employees in their homes and at the same time insist that unions be furnished with employee names and addresses so that they may engage in home visits. The short answer to this argument is that employers are free to communicate with their employees in the plant; a union, as a practical matter, is severely limited in its efforts at in-plant communications. See *Plant City Welding and Tank Co.*, 119 NLRB 131, 133-134; see, also, footnote 10, *supra*.

[28] Member Brown would accept the Regional Director's findings and recommendation.

IT IS HEREBY CERTIFIED, in *K. L. Kellogg & Sons*, Case No. 21-RC-8955, that a majority of the valid ballots has not been cast for International Union of Operating Engineers, Local No. 3, AFL-CIO, and International Union of Operating Engineers, Local Union No. 12, AFL-CIO, and that said labor organizations are not the exclusive representative of the employees in the unit herein found appropriate, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman

JOHN H. FANNING, Member

GERALD A. BROWN, Member

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

EXHIBIT D.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-RC-9073

In the Matter of

WYMAN-GORDON COMPANY Employer

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO Petitioner

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO Intervenor

SUPPLEMENTAL DECISION

Pursuant to a Decision and Direction of Election by the Regional Director, dated September 6, 1966, an election among certain employees of the Employer was held on September 29, 1966.[1] The Tally of Ballots cast at said election is as follows:

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[1] The unit found appropriate is as follows: All production and maintenance employees including power plant employees, cafeteria employees, leaders, hourly-rated laboratory employees, and model makers, employed by the Employer at its Worcester, North Grafton, and Millbury, Massachusetts plants, but excluding office clerical employees, plant clerical employees, salaried laboratory and all engineering employees, time keepers, time study employees, professional employees, guards and watchmen, dispatchers, assistant foremen, working foremen, and all supervisors as defined in the Act.

Approximate number of eligible voters	1750
Void ballots	10
Votes cast for International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO	226
Votes cast for United Steelworkers of America, AFL-CIO	555
Votes cast against participating labor organizations	903
Valid votes counted	1684
Challenged ballots	6
Valid votes counted plus challenged ballots	1690

On September 30, 1966, the Intervenor filed timely Objections to Conduct Affecting Results of the Election, serving copies on the other parties. These Objections allege the following:

"1) The Employer did not provide an election eligibility list as required by *Excelsior Underwear, Inc.*, 156 NLRB No. 111.

"2) By this and other acts, the Employer violated the Act and the Board's Rules relating to pre-election conduct."

On October 5, 1966, the Petitioner by telegram filed likewise timely Objections, in which it alleges the following:

"1. The Employer failed to provide an election eligibility list as required by *Excelsior Underwear, Inc.*, 156 NLRB No. 111.

"2. By this and other acts, the Employer violated the Act and the Board's Rules and Regulations relating to pre-election conduct."

Copies of these Objections were likewise served upon the other parties.

Pursuant to 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has conducted an investigation.

Because both sets of Objections raise identical issues, they will be treated together.

Investigation reveals:

1. The petition herein was filed on July 12, 1966. On July 13, the Employer was notified by letter of the filing of said petition and in Paragraph 4 of said letter was advised as follows:

> "4. In the event an election is agreed to or directed in this case, the Board requires that a list of names and addresses of all the eligible voters be filed by the employer with the undersigned, who will in turn make it available to all parties to the case. The list must be furnished to the undersigned *within seven (7) days* of the direction of or agreement to election. I am advising you now of this requirement so that you will have ample time to prepare for the eventuality that such a list may become necessary. This list is in addition to list requested in Item 1 for purposes of showing evidence of interest."

A hearing on the petition was held on August 26 and as stated, the Direction of Election issued on September 6. It contains a footnote 3 which reads as follows:

> "[3] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, on or before September 13, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear, Inc.*, 156 NLRB No. 111."

On September 13, the election arrangements were discussed with representatives of the parties at the Regional Office and, as far as here material, the Employer agreed to furnish an eligibility list for the purpose of checking by the patries at a pre-election conference at the Holiday Inn, Worcester, Massachusetts, which was scheduled for September 26. The Employer did not agree to furnish a list including names and addresses to the parties as required by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 111.' Both unions desired, nevertheless, to proceed with the election. Official Notices of Election were mailed to the parties on September 22, 1966 and posted during the required period throughout the plant by the Employer.

The Employer does not dispute to have been requested and to have refused to furnish the Unions with the type of list required under *Excelsior, supra.* In a letter to the Regional Office, dated October 13, 1966, the Employer stated its position as follows:

> "In regard to the first objection, it is the Company's position that (1) in promulgating the rule the Board did not comply with the provisions of the administrative Procedure Act and the rule is therefore invalid, (2) the rule constitutes an invasion of the right of privacy of the employees of the Company, (3) the rule is in direct violation of Section 302 of the Act and could result in criminal prosecution of the Employer, (4) the rule would require the Employer to violate provisions of the National Labor Relations Act under Section 8(a), (5) the rule constitutes the taking of property of the Company without due process of law, (6) the ruling of the Board requiring the submission of the mailing list is contrary to the decisions of the Supreme Court in regard to the rights, or lack thereof, of Unions to be granted assistance from an Employer in their organizational campaigns when other adequate facilities and opportunities for organizational activity are readily available to them, (7) the rule of the Board, in violation of the principles of the Act, promotes an invalid dual standard of conduct between Unions and Employers insofar as there is a disparity of treatment in regard to Union

visitation in the homes and Company visitation, and (8) in the instant case there is no need for the giving of lists containing names and addresses of employees inasmuch as it is our understanding that immediately prior to the election both Unions mailed to our employees, at their homes, Union propaganda. Inasmuch as both Unions had available to them mailing lists, the requirement that the Company comply with the *Excelsior* rule is not applicable in the instant proceeding."

The Employer also requested that a hearing be held on the Items 3, 5 and 8 set forth above since they "raise issues of fact." The undersigned disagrees as to Items 3 and 5 and is of the opinion that they do not raise issues of facts warranting a hearing. As to Item 8, both Unions disclaim to have received from any other source a complete list of names and addresses of all employees in the unit found appropriate. It will be noted that the Employer does not assert that the Unions had a complete list available and merely alleges that it is its "understanding" that the Unions mailed propaganda to the homes of employees. Under these circumstances, the undersigned believes that a hearing on the matter raised in Item 8 of the Employer's letter would likewise serve no useful purpose.

Adverting to the substance of Employer's arguments, it is well known that *Excelsior* issued only after oral argument and briefs, including *amicus curiae* briefs by interested parties. The Board has considered arguments such as those made here and nevertheless established the requirement embodied in *Excelsior* and the undersigned is bound by it.

Accordingly, and because the Board "regard(s) a refusal to furnish the information in question as tending to interfere with the prospects for a fair and free election", merit is found to this Objection.

2. No further evidence was adduced by either objecting party in support of this Objection, although opportunity to do so was given. This Objection is, therefore, found to lack merit.[2]

---

[2] *Felix Bonura Co.*, 119 NLRB 1620.

Having found merit to Objection 1, the undersigned sets the election held on September 29 aside and will conduct a new election at a place and time to be determined. Eligible to vote will be those employees in the unit employed during the payroll period immediately preceding the issuance of the new notices of election.

An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days after the date of the issuance of the notice of the second election by the Regional Director. The Regional Director shall make the list available to all parties to the election. Under Board directives, no extension of time to file this list may be granted, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear, Inc.*, 156 NLRB No. 111.

Dated at Boston, Massachusetts, this 19th day of October, 1966.

/s/ ROBERT E. GREENE
ROBERT E. GREENE,
Acting Regional Director
National Labor Relations Board
First Region
Boston, Massachusetts

EXHIBIT E.

[25102 EVDAC

221715 [13013 MSCEV344744
RAAU JHZ RUEVDEL0019 3202200-UUUU—RUEVDAC.
FM HOWARD W KLEEB ASSO EXE SEC NLRB WASHINGTON DC
TO RUEVDAC/3/HERRICK SMITH DONALD FARLEY KETCHUM ATT QUENTIN YOUNG ESQ 294 WASH ST BOSTON MASS
TO RUEVDAC/3/ANGOFF GOLDMAN MANNING PYLE ATT ROBERT D MANNIN? ESQ 44 SCHOOL ST BOSTON MASS
TO RUEVDAC/3/NLRB BOSTON MASS
BT
RE: WYMAN-GORDON, 1-RC-9078. IT IS HEREBY ORDERED THAT THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION BE, AND IT HEREBY IS, DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD—:
BT

EXHIBIT F.

December 1, 1966

Quentin Young, Esq.
c/o Herrick, Smith, Donald, Farley & Ketchum
294 Washington Street, Boston, Massachusetts

Vincent J. Curran, Intl. Rep.
International Brotherhood of Boilermakers,
Iron Shipbuilders et al
1 Greenwood Street
Worcester, Massachusetts

Robert D. Manning, Esq.
Angoff, Goldman, Manning & Pyle
44 School Street
Boston, Massachusetts

Re: Wyman-Gordon Company
Case No. 1-RC-9073

Gentlemen:

This is to notify you that a re-run election in accordance with the Regional Director's Supplemental Decision of October 19, 1966 will be held on Thursday, December 29, 1966 in the same locations and with the same hours as in the previous election at both the Worcester and North Grafton plants. Eligible employees are those on the payroll for the week ending November 26, 1966 and a copy of the Notice of Election will be mailed to all parties on December 2. If the Employer should fail to comply with the requirement of giving a list of names and addresses within seven days from the issuance of the Notice of Election, it is probable that the Board in Washington will seek a subpena to require the production of such list and also seek enforcement of such in the appropriate court and, therefore, that the election which is set for December 29 would not be carried out. If the Company should change from its previous position and in this re-run election submit the requested list of names and addresses, copies will be made available to all parties immediate and

a short postponement of the date from the holiday period would probably be entertained to the benefit of all concerned. The above procedural problems have been discussed with each of the addresses by phone prior to this letter but if any of the parties have any questions concerning this matter they may call the undersigned at their convenience at 223-3350. Thank you for your cooperation in this matter.

Very truly yours,

JOSEPH C. BARRY
Supervisory Examiner

cc: Wyman-Gordon Company
105 Madison Street
Worcester, Massachusetts

Russell N. Berg
750 New Brotherhood Building
Kansas City, Kansas

Charles F. Moran, Intl. Vice Pres.
25 West 49th Street, Rm. 1203
New York, N.Y.

United Steelworkers of America, AFL-CIO
29 Pearl Street
Worcester, Massachusetts

EXHIBIT G.

SUBPENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To James W. Stoddard, President
Wyman-Gordon Company, 105 Madison Street, Worcester, Massachusetts

Request therefor having been duly made by Michael F. Walsh, Counsel for the Regional Director, National Labor Relations Board *whose address is* John F. Kennedy Federal Building Cambridge & New Sudbury Boston Massachusetts

You are hereby required and directed to appear before Albert J. Hoban, Regional Director, or his designated representative of the First Region *of the National Labor Relations Board, at* 20th Floor, National Labor Relations Board, J.F.K. Federal Bldg., Cambridge and New Sudbury Streets *in the City of* Boston, Massachusetts *on the* 30th *day of* December, *1966, at* 1:00 *o'clock* p.m. *of that day, to testify in the Matter of* WYMAN-GORDON COMPANY Case No. 1-RC-9073

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents: See Appendix

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at Boston, Massachusetts *this* 27th *day of* December, *1966*

HOWARD JENKINS, JR

APPENDIX

The books and records of Wyman-Gordon, 105 Madison Street, Worcester, Massachusetts, containing the names and addresses of all employees employed at Wyman-Gordon Company during the payroll period immediately preceding October 19, 1966 in the following collective bargaining unit:

> All production and maintenance employees including power plant employees, cafeteria employees, leaders, hourly-rated laboratory employees, and model makers, employed by the Employer at its Worcester, North Grafton, and Millbury, Massachusetts plants, but excluding office clerical employees, plant clerical employees, salaried laboratory and all engineering employees, time keepers, time study employees, professional employees, guards and watchmen, dispatchers, assistant foremen, working foremen, and all supervisors as defined in the Act.

In lieu of the above corporate books and records the Regional Director will accept a list containing the subpenaed information. The list must be signed by an officer of the corporation who is authorized to do so. The list in lieu of corporate books and records will be accepted after designated agents of the National Labor Relations Board have verified its contents by examination of the subpenaed books and records at a time and place convenient to the corporation but not later than the date of appearance specified in the subpenas.

[Receipt of mail attached.]

EXHIBIT H.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-RC-9073

In the Matter of

WYMAN-GORDON COMPANY Employer

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO Petitioner

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO Intervenor

MOTION TO QUASH

Comes now Robert W. Stoddard, for himself and as President of Wyman-Gordon Company, by counsel, Herrick, Smith, Donald, Farley & Ketchum, in answer to the Subpena Duces Tecum issued under the name of Howard Jenkins, Jr., to James W. Stoddard, as President (Mr. Stoddard's correct name being Robert W. Stoddard), # B61000, dated December 27, 1966 and in response thereto moves the Board to quash said subpena on the following grounds:

1. That said subpena was issued on the basis of a Decision of the National Labor Relations Board, to wit Excelsior Underwear, Inc., 156 NLRB No. 111.

2. That the rules and regulations the Board has attempted to establish in Excelsior are unconstitutional, invalid, and unauthorized under the provisions of the Na-

tional Labor Relations Act, as amended, for the following reasons:

A. In promulgating the Excelsior rule, the Board did not comply with the provisions of the Administrative Procedure Act (5 USCA, Chapter 19, Section 1001 *et seq*) and the rule is therefore invalid.

B. The Excelsior rule constitutes an invasion of the right of privacy of the employees of the Employer.

C. The Excelsior rule constitutes the taking of property of the Employer without due process of law.

D. The Excelsior rule requiring the submission of a mailing list to the Board is contrary to decisions of the United States Supreme Court in regard to the rights, or lack thereof, that Unions be granted assistance from an Employer in their organizational campaigns when other adequate facilities are readily available to them.

E. The Excelsior rule is in violation of the principles of the Act insofar as it promotes an invalid dual standard of conduct between Unions and Employers insofar as there is a disparity of treatment in regard to Union visitation in the homes of the employees and a prohibition against the Employer for the same type of solicitation.

F. In the instant case there is no need for the giving of lists containing names and addresses of employees inasmuch as it is the Employer's understanding that immediately prior to the election both Unions mailed to its employees, at their homes, Union propaganda. Inasmuch as both Unions had available to them mailing lists, the requirement that the Company comply with the Excelsior rule is not applicable in the instant proceeding.

G. The Excelsior rule is in clear violation of the provisions of Section 8 (a) (2) of the Act, which prohibits an employer to give assistance to a labor organization seeking to represent its employees.

H. The Excelsior rule would require the Employer to violate Section 302 (a) (2) of the Act.

3. That said subpena calls for the production of records exceeding the Board's lawful authority.

4. That the information required by said subpena does not come within the provisions of Section 11 (2) of the

aforesaid Act and that the Board is without legal authority to issue said subpena.

Now, therefore, Robert W. Stoddard individually and as President of Wyman-Gordon Company, through counsel respectfully requests the Board to quash, nullify and withdraw said Subpena.

Respectfully submitted,

HERRICK, SMITH, DONALD,
FARLEY & KETCHUM

By QUENTIN O. YOUNG
QUENTIN O. YOUNG

December 30, 1966

EXHIBIT I.

Albert J. Hoban
Director, NLRB
Boston, Massachusetts

Quentin O. Young
Herrick, Smith, Donald,
Farley & Ketchum
294 Washington Street
Boston, Massachusetts

International Brotherhood of
Boilermakers, etc.
Att: Vincent J. Curran
1 Greenwood Street
Worcester, Massachusetts

Robert D. Manning
Angoff, Goldman, Manning &
Pyle
44 School Street
Boston, Massachusetts

RE: WYMAN-GORDON COMPANY, 1-RC-9073. IT IS HEREBY ORDERED THAT EMPLOYER'S PETITION TO REVOKE SUBPENA DUCES TECUM BE, AND IT HEREBY IS, DENIED. BY DIRECTION OF THE BOARD:

ROBERT VOLGER
Associate Executive Secretary
National Labor Relations Board

RV:har Order Section 5958 January 10, 1967 3:10 pm

ANSWER.

[Filed April 18, 1967.]

Come now the defendants, Wyman-Gordon Company and Robert W. Stoddard as Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company by their attorneys, Herrick, Smith, Donald, Farley & Ketchum, and in answer to said complaint allege as follows:

COUNT I

1. As to paragraph No. 1, the defendants admit the allegations contained therein.

2. As to paragraph No. 2, the defendants deny that James W. Stoddard is President of Wyman-Gordon Company but admit that Robert W. Stoddard is Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company and admit the remaining allegations contained in said paragraph.

3. As to paragraph No. 3, the defendants deny that this District Court has jurisdiction in the instant proceeding to enforce the subpoena of the Board.

4. As to paragraph No. 4, the defendants admit the allegations contained therein.

5. As to paragraph No. 5, the defendants admit the allegations contained therein.

6. As to paragraph No. 6, the defendants admit the allegations contained therein.

7. As to paragraph No. 7, the defendants admit the allegations contained therein.

8. As to paragraph No. 8, the defendants admit the allegations contained therein.

9. As to paragraph No. 9, the defendants admit the allegations contained therein.

10. As to paragraph No. 10, the defendants admit the allegations contained therein.

11. As to paragraph No. 11, the defendants admit the allegations contained therein except that they deny that the alleged rule in the *Excelsior* case is a valid rule of the Board.

12. As to paragraph No. 12, the defendants admit the allegations contained therein except that they deny that the *Excelsior* rule is a valid rule of the Board and deny the allegation that such rule promotes communication of election issues or aids in the chellenging of ballots of employees believed ineligible to vote.

13. As to paragraph No. 13, the defendants admit the allegations contained therein except that they deny that the *Excelsior* rule is a valid rule of the Board.

14. As to paragraph No. 14, the defendants admit the allegations contained therein.

15. As to paragraph No. 15, the defendants admit the allegations contained therein but deny the validity of the *Excelsior* rule.

16. As to paragraph No. 16, the defendants deny the allegations contained therein.

17. As to paragraph No. 17, the defendants admit the allegations contained therein but deny the validity of the *Excelsior* rule.

18. As to paragraph No. 18, the defendants admit the allegations contained therein except that they deny that James W. Stoddard is President of the defendant company but admit that Robert W. Stoddard is Chairman of the Board of Directors and Chief Executive Officer of the defendant company.

19. As to paragraph No. 19, the defendants deny the allegations contained therein in reference to James W. Stoddard but admit the allegations contained therein in regard to Robert W. Stoddard.

20. As to paragraph No. 20, the defendants admit the allegations contained therein.

21. As to paragraph No. 21, the defendants deny the allegations contained therein in reference to James W. Stoddard but admit the allegations contained therein in regard to Robert W. Stoddard.

22. As to paragraph No. 22, the defendants deny the allegations contained therein.

COUNT II

1. As to paragraph No. 1, the defendants repeat the answers set forth above and as if fully set forth here in paragraphs 1 through 22.

2. As to paragraph No. 2, the defendants deny that the statutes cited in said paragraph grant jurisdiction to this Court over the substance of this litigation.

3. As to paragraph No. 3, the defendants admit the allegations contained therein.

4. As to paragraph No. 4, the defendants deny that the Board acted within its statutory jurisdiction in establishing the election rule of the *Excelsior* decision.

5. As to paragraph No. 5, the defendants deny the allegations contained therein.

AFFIRMATIVE DEFENSE

As and for an affirmative defense, the defendants allege as follows:

1. In promulgating the *Excelsior* rule, the Board did not comply with the provisions of the Administrative Procedure Act (5 USCA, Chapter 19, Section 1001 *et seq*) and the rule is therefore invalid.

2. The *Excelsior* rule constitutes an invasion of the right of privacy of the employees of the employer.

3. The *Excelsior* rule is contrary to the decisions of the courts, including the United States Supreme Court.

4. The *Excelsior* rule is inapplicable to the present case inasmuch as the unions had adequate access to the employees, their names and home addresses.

5. The *Excelsior* rule is in violation of the provisions of Section 8(a)(2) of the Act, which prohibits an employer's giving assistance to a labor organization seeking to represent its employees.

6. The *Excelsior* rule would require the Employer to violate Section 302(a)(2) of the Act, and the demand of the Board is a violation of Section 302(b)(1).

7. The subpoena calls for the production of records exceeding the Board's statutory authority; and the information required by said subpoena does not come with-

in the provisions of Section 11(2) of the Act; and the Board is without statutory authority to issue said subpoena and the Court is without jurisdiction to enforce it, insofar as it does not call for the production of testimony or evidence.

Wherefore, defendants Robert W. Stoddard, individually and as Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company, and Wyman-Gordon Company respectfully pray:

(a) That the complaint herein be dismissed in its entirety;

(b) That in the alternative an order be issued denying the Plaintiff's request for an order to show cause;

(c) That the Board be directed pursuant to Section 9 of the National Labor Relations Act (29 U.S.C., Sec. 151 *et seq*) to issue a certification of the results of the election and to declare that neither union has the right to represent the employees of the defendant, Wyman-Gordon Company;

(d) That defendants, Robert W. Stoddard as Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company and Wyman-Gordon Company have such other and further relief as may be necessary and appropriate in the premises.

HERRICK, SMITH, DONALD,
FARLEY & KETCHUM

By QUENTIN O. YOUNG

EXHIBIT A.

NATIONAL LABOR RELATIONS BOARD
REGION 1

John F. Kennedy Federal Building
Cambridge and New Sudbury Streets
Boston, Massachusetts 02203

Telephone 223-3300
July 13, 1966

Wyman-Gordon Company
105 Madison Street
Worcester, Massachusetts

Re: Wyman-Gordon Company
Case No. 1-RC-9078

Gentlemen:

This is to advise you that a petition (copy attached) seeking investigation and certification of representatives, pursuant to Section 9 (c) of the National Labor Relations Act, as amended, has been filed in this office by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

This case has been assigned to Benjamin Smith, Attorney whose telephone number is 223-3337 and who will contact you to the end that, if appropriate, the question of representation may be resolved by secret ballot election to be conducted under the supervision of this office.

It will be appreciated if you will meanwhile prepare and submit to this office the following:

1. An alphabetized list of all employees in the unit involved in the petition, this list to be prepared for the payroll period immediately preceding the date of this letter and to include job titles or work classifications;

2. Copies of any contracts which you may have with any labor organizations covering any employees in the unit involved in the petition;

3. Copies of any correspondence bearing on the question of representation herein.

4. In the event an election is agreed to or directed in this case, the Board requires that a list of names and addresses of all the eligible voters be filed by the employer with the undersigned, who will in turn make it available to all parties to the case. The list must be furnished to the undersigned *within seven (7) days* of the direction of or agreement to election. I am advising you now of this requirement so that you will have ample time to prepare for the eventuality that such a list may become necessary. This list is in addition to list requested in Item 1 for purposes of showing evidence of interest.

Very truly yours,

ALBERT J. HOBAN
ALBERT J. HOBAN
Regional Director

Enclosure:

cc: Boilermakers, AFL-CIO
1 Grenwood St.
Worcester, Mass.
Attn: Vincent J. Curran, Int. Rep.
Russell K. Berg
570 New Brotherhood Bldg.
Kansas City, Kansas 66101
Charles F. Moran, I.V.P.
Boilermakers, AFL-CIO
25 West 45th St., Rm. 1203
New York, N.Y. 10036

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• Robt D mech Henry Wilson r65 Mason
• Robt F reporter WT&G r Rutland
• Ronald R slsmn Employers Mut of Warsaw r Northboro
• Westill C (Barbara L) customer eng IBM h53 Butter
Sirkendall Bertha L (wid Henry L) social wkr Guild of St Agnes Day Nursery h2 Hancock Hill dr
• Henry L (Maureen E) phys 21 West h134 Newton av N
Kirkilis Andrew J (Kath) retd h32 Ripley
• Kath Mrs lodgings 20 John h do
Kirklauskas Barbara A tchr Burncoat Jr High Sch r10 Upsala
• Jos P (Ann) press opr WG h70 Upsala
• Peter retd h58 Cutter
• Thos J studt r70 Upsala
Kirkorian Geo J (Mary C) baker Langones Bakery (Westboro) h21 St Kevin rd
• Geo J jr studt r21 St Kevin rd
Kirkos Arth lab Geo Kirkos r172a Austin
• Geo (Harriet) mason 172a Austin h do
• Kiry mason Geo Kirkos r172a Austin
Kirkpatrick Carol A clk MPA r Sterling
• Chas D die mkr Hultgren Mfg r Millbury
• Chas D (Cath S) wire wkr Thompson Wire h26 Lavallee ter
• Helen B (wid Steph E) h34 Chestnut
• Janet E studt r10 Brookshire rd
• Richd D lab Francis Harvey & Sons r15 Gordon
• Richd M (Claire C) constn wkr h15 Gordon
• Thos H (Margt C) v-pres-actuary MPA h10 Brookshire rd
Kirmel Anthony (Sophie) lab A Amorello & Sons h26 Ward
• Mary A r26 Ward
Kirminas Algird P emp USS r44 Mendon
• Bernice r44 Mendon
• Casimer (Antoinette) h44 Mendon
Kirouac Rene B sht mtl wkr NCo r Leominster
Kirousis Geo r654 Main
Kirrana Martin r43 Converse
Kirsch Irving (Bertha) dept mgr Paul Hats h3 Sherwood rd
• Robt r3 Sherwood rd
Kirschner Louis (Tillie) retd h946 Pleasant
• Marie Mrs slswn Richd Healy Co r32 Lake av
Kirusis Geo (Theodora) bartndr h127 Highland
Kirvilaitis Anthony (Irene P) patenter Natl Stand h17 Duxbury rd
• Irene P Mrs aide Hahnemann Hosp r17 Duxbury rd
Kirwan see also Kerwin & Kirwin
• Kathleen V Mrs clk Worc County Natl Bk r65 Warner av
• Patk J (Kath V) asst chf probation ofcr Central Dist Ct h65 Warner av
Kirwin John J driver Yellow Cab r3 Stoneland rd
• Raymond F (Jean P) installer NET&T h16 Stoneland rd
• Rhoda M clk MPA r3 Stoneland rd
• Ruby M (wid John J) retd h22 Osceola av
• Wm F (Patricia A) driver A J Mattress h21 Great Brook Valley av apt 5
Kisielauskas Edw J (Lucille C) clk C&K h3 Benjamin rd
• Margt M r30 Arthur
Kisiel Adela E (wid Jos) h87 Perry av
• Chesław h27 Ellsworth
• Edmund J (Hedwig R) clk Perry Avenue Mkt h39 Perry av
• Helen stitcher Herab Neckwear r4 Sigel
• Helen Mrs stitcher Herab Neckwear h4 Sigel

KISIEL
" Henry F (Clara B) policemn City Police Dept h31 Ayrshire rd
" Josephine clk Muir's Lndry r West Boylston
" Mathew J (Sally) insp WG r224 Providence
" Peter retd h3 Camden av
" Richd W studt r144 Kendig
" Stefania Mrs insulator H H Brown Shoe r27 Ellsworth
" Wm J (Anna T) slsmn h144 Kendig
Kisielaitis Jos (Julia) tailor Hayward Tailors h26 Derby
" Victor studt r26 Derby
Kisielatis Pravis (Mary) retd h63 Waverly
Kisielsis Peter P (Frances) retd h114 Vale
Kisk Beatrice D (wid Albert W) cook Anna Maria College h1 Tallawanda dr
Kisiak Mary (wid Jos) h3 Arwick av
Kislik Abr (Pauline) retd h4 Loxwood
Kissel Beatrice T (wid Jos) retd h14 S Ward
" Rita A bkpr Morse Bros Elec r14 S Ward
Kissell Gerald P designer NCo r Jefferson
" Gustaf C lab Stand Fdry r3 Maxwell ct
" Jas insp WG (G) h3 Maxwell ct
" Peter opr USS h3 Maxwell ct
" Wm J (Lorraine M) furnace wkr WG h28 Gediminas
Kisten Peter A (Edna) mach USS h14 S Ward
" Richd L mach Heald r14 S Ward
" Walter bartndr Ed Smith's Restr r76 Perry av
Kistle Harold mgr Airco-Worc Welding Sup r Paxton
Kitchen Contractors Inc Doris P Blaum pres Edw B Blaum treas Rita S Paradise sec 268 Lincoln
Kitchings Alice M (wid Hillie S) h24 Ormond
" Vivian ofc sec Shrewsbury Library r24 Ormond
Kitonis Anthony J (Lillian) mixer Bay State Abrasives h42 Dorchester
" Raymond (Eleanora) retd h2 Lodi
Kitsalis Angelo retd h860 Main
Kitsos Harry (Areti) cln Table Talk h19 Ledge
Kittel Robt M exec v-pres Rand-Whitney Corp (corrugation div) r Holden
Kitteridge Patk retd h35 Boudoin
Kittredge Barbara studt r10 Lagrange
" Delia Mrs h10 Oxford
" Edw F studt r12 Sherburne av
" Edw J (Marie A) bmo Jamesbury Corp h36 Patch Reservoir dr
" Edw J retd h22 Cutler
" Edw P (Ellen E) retd h12 Sherburne av
" Electric Co Inc John J Kittredge pres electn 10 Lagrange
" Francis J (Theresa C) asst cash Worcester County National Bank h22 Brighton rd
" Irene A custdn Commerce Bldg r4 Arthur
" John J (John J Kittredge Monumental Wks) r72 Morningside rd
" John J (Bernice D) pres Kittredge Elec h10 Lagrange
" John J Monumental Works (John J Margt G and Jos J Kittredge) 152 Webster
" John P (Marie) field aud State DP Wel r Clinton
" Jos F (Mary) hoist opr Mass Elec h53 Beaver
" Jos F (Ann M) linemn New Eng Power h60 Oneida av
" Jos J (Madeline F; John J Kittredge Monumental Wks) h72 Morningside rd
" Louise F (wid Richd W) cook Shattuck Nursing Home h42a Maravista rd

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EXHIBIT B.

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" Alf W electn N Co r Sterling Junction Mass
" Bessie M (wid Allen) r3 Englewood av
" Chester clerk Nissen Baking r Shrewsbury Mass
" Clarence W retd h9 Metcalf
" Clarence W jr (Jane G) supt N Co h1 Barry rd
" Clifford B jr comp WT&G r Grafton Mass
" David r30 Portland
" David studt r8 Mallard rd
" David L (Joan L) slsmn Harr Ford h6 Freeland
" Donald P studt r8 Mallard rd
" Douglas J (Joan C) mgr Electime Appliance Service h10 Winchester av
" Dwight C (Esther M) h53 Elm apt 42
" Edna M (wid Lester G) h10 Fruit
" Edw A clk Telechron h78 Providence
" Elizabeth M Mrs clk State Mut Life r Paxton Mass
" Emil G (Dorothy E) forger hlpr WG h481 Cambridge
" Eug emp WG r96 Green
" Eug E (Dorothy M) h13 Pleasant ter
" F Harold (Eleanor G) pres Worcester Academy h190 Salisbury
" Felix r728 Main
" Florence counter girl Messiers Diner r69 Providence
" Harold D (Lillian) supt L Farber Wilting r North Grafton Mass
" Hedwig (wid Adam) r78 Providence
" Henry G refgr dept N Co r Upton Mass
" House (Worcester Natural History Society) museum 21 Cedar
" John (Lois) emp WG h21 Washburn
" John F (Mary C) pharm Lambert Drug h179 June
" John J (Rose) retd h38 Sigel
" John L studt r6 Freeland
" Jos E retd h38 Belmont
" Jos F studt r179 June
" Jos J mach opr C&K r Webster Mass
" Julie R Mrs clk MPA r Cherry Valley Mass
" Lee E (Norma J) weaver Sherman Textile h27 Bellevue
" Leo W (Margt; Leo's Spa) h4 Cardinal rd
" Marclynne fnshr Dapol r37 Pemberton
" Marie clerk Russell Daniels Auto Sales r Paxton Mass
" Marie G Mrs mgr Wardwell Apartments h728 Main
" Marion F (wid Alfred) h134 Ingleside av
" Marjorie E Mrs fcty wkr Precmet Corp h878 Main
" May Mrs clerk Denholm's r179 June
" Michl studt r728 Main
" Mirabel supvr Amherst Retarded Children's Assn r35 Chestnut
" Napoleon T (Helen) foreman Stand Fdry r56 Dawson rd
" Norman L (Ann R) clk A&P h5 Nixon av
" Peter J (Florence A) shipper Nissen Bakery h69 Providence
" R Bawson (Cecile A) forman Montrose Products h8 Mallard rd
" Richd dishwasher Jewish Home for Aged r179 June
" Richd F (Ann M) sorter L Farber h21 Washburn
" Richd J (M Nerlin) mach opr Jarvisbury Corp h43 Dawson rd

DANIELS
" Richd P studt r152 Chester
" Robt hlpr Bloomfield r30 Portland
" Robt formn L Farber r52 Seymour
" Robt J (Teresa E; Daniels Serv Sta) r Dudley Mass
" Robt L (Olive K) driver DeMambro Radio Sup h85 New Vista la
" Ronald K (Marilyn J) asmblr C&K h37 Pemberton
" Russell pres-treas Russell Daniels Auto Sales r Paxton Mass
" Russell W Auto Sales Inc Russell W Daniels used car sales 173 Stafford
" Service Station (Robt J Daniels) 1380 Main
" Sophia H (wid Anthony) retd h95 Ward
" Stella A Mrs nurse Worcester City Hosp r152 Chester
" Suzanne studt r1 Barry rd
" Victor J (Emma M; A L Purinton) h6 Judith rd
" Vyto C (Stella A) slsmn Craftsman Inc h152 Chester
" Wm T (Susan) sweeper John Bath h4 Reeves
" Wm T jr jig mkr C&K r Cherry Valley Mass
Danielson Axel T baker WS Hosp r305 Belmont
" David H (Ebba M) retd h10 Watson av
" Evelyn D Mrs sales wn Grant's r North Grafton Mass
" Floyd (Marilyn) bus mn (North Grafton) h45 Lancaster
" Frank E r21 Whipple
" Gordon V expediter N Co r54 Airlie
" Harvey emp VA Hosp (Beacon NY) h10 Denny
" Ida r835 Main
" Ingeborg (wid Olaf) retd h294 Lovell
" Jean E Mrs clerk People's Sav Bk r5 Rexhame rd
" Johanna r14 John
" Jos r5 Irving
" Marilyn E Mrs clk State Mut Life r45 Lancaster
" Merton E (Jean E) group leader N Co h5 Rexhame rd
" Norman G emp N Co r60 Washington (S)
" Otelia M (wid Arth G) h110 Leeds apt 2
" Paul H (Lillian M) retd h12 Wellington
" Rhondi studt r203 Moreland
" Richd h14 Crown
" Richd E porter Duprey Bldg r3 Charlton
" Victor C (Cora M) retd h54 Airlie
" Walter T (Mary G) clk Mass Elec h480 Sunderland rd
" Walter O (Gladys) stockmn Mass Elec Light h1 Ashland
Danilowicz Elaine S r14 Copperfield rd
" John W (Malvina S) driver Nissen Baking h14 Copperfield rd
" Joy M studt r14 Copperfield rd
" L Paul (Mary E) lwyr State Mut Life h16 Tupelo rd
" Mary E Mrs ofc sec State Mut Life r16 Tupelo rd
" Stanley J (Alfreda B; D Enterprises) h1 Claridge dr
Danis Richd R (Kath) reporter WT&G h19 Moore
Danisiewicz Frank J sweeper N Co
Dank Jos T (Alvina) sand mixer Stand Fdry h53 Canterbury
Danko Elaine K studt r71 Esther
" Jos J (Helen) die mkr Progressive Tool (Westboro) h71 Esther
" Michl J (Jean B) carp h15 Marion av
Dann Emil r97 Granite
" Lucy G slswn Richd Healey h45 Chatham
" Milton J (Esther) ofc mgr Arthur Hahn h97 Granite
Danna Anthony emp USS r4 Jennette
" Barbara A nurse Elton Yassina & Roy R Singer r2 Shamrock
" Domenic P (Helen L) asmblr C&K h197 Swenson av
" Dominic (Jennie) retd h23 Cross
" Nunzio J (Rose E) asmblr C&K h2 Shamrock
" Robt J (Mary L) custdn City School Dept h64 Gage
Dahneberger Arth (Constance M) insp H&R h4 Patch Reservoir dr
Danner Howard A treas Fitzpatrick Lease r Dover
" Wm A treas Parker-Danner r Brookline Mass
D'Annolfo Ralph (Assunta A) tailor Howard-Clothes h21 Elizabeth

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Hull Delia Mrs r27 Shelby
" Edna Mrs clk Livingston Camera Stores r4 Holland rd
" Evan B mach Geo J Meyer Mfg r Northboro
" Jean C (Sharon L) snagger O S Walker Co h16 Bourne
" John H (Beatrice) mgr of metallurgy WG r Oxford
" Kenneth C (Judith A) lab O S Walker Co h165 Perry
" Marjorie P clk Parker & Macpherson r3 Park Avenue pl
" Mildred (wid John H) r651-1 Chesterfield rd
" Milton A (Edna) mach opr Leland-Gifford h4 Holland
" Robt F (Janice) mach opr Wright Mach h4 Greenwood
" Stanley P tchr Leicester Jr College h3 Park Avenue pl
" Steph S (Jean) supvr Prov Mut Life Ins r Westboro
" Viola M Mrs slswn Grant's h27 Shelby
" Virginia H Mrs tchr Belmont Street Sch r Northboro
Hulnik Jane E bkpr F A Knowlton Inc r114 Endicott
" Mary A (wid Jos) h114 Endicott
Hult Ann M mgr United Food Management h33 Vernon
" Beda r5 Gorham
" Carl R (Mary A) driver M&M Trans h37 Jaques av
" Edw D (Dorothy) v-pres Lundquist Tool & Mfg r Auburn
" Enis C h1 Cedar apt 22
" Gertrude H (wid Philip S) ofc sec WPI h120 Lincoln
" Helen L comptometer opr N Co h6 Ralph av
" Helmer C (Agnes L) retd h16 Paul
" John R (Margaret M) prsmn N Co h46 Courtland
" M Joyce Mrs ofc wkr h21 Hillside
" Mary F typ Worc County Natl Bk r37 Jaques
" Ruth I r7 Ekman
" Sven H (Loretta) floorman Holmes Electrotype h11 Mt Pleasant
Hultberg Alice L (wid Richd R) supvr Fuller Regalia h4 Quincy
" Edw E engr Worc Engraving r Oxford
" Evald G engr Worc Engraving r Millbury
" Geo E (Janice) firefighter Fire Dept h1 Genoa
" Grace C nurse Hahnemann Hosp h138 Woodland apt 2
" Norman E engr WT&G r4 Quincy
" Sture A (Elin N) retd h20 Ericsson
Hulten Geo C (Anna L) ins appraiser S Carlisle h do
" Geo S (Janet S) mech N Co h65 Andover
" Geo S jr mldr N Co r65 Andover
" Janet S Mrs multilith opr Community Services of Greater Worc r65 Andover
Hultgren David R (Margt M) h16 Puritan av
" Edwin W (Hultgren Mfg) r Holden
" Godfred N (Linnea) clk North Worc Mkt h7 Oswald
" Helen Mrs slswn Harpers r Leicester
" Herman R (Victoria) wire drawer JS&W h872 Millbury
" Hugo C (Helen) wire drawer JS&W r Leicester
" Kenneth die mkr Hultgren Mfg r Holden
" Kenneth W floorman N Co r Millbury
" Lennart C (Virginia) trucker Heald h60 Esther
" Manufacturing Co (Edwin W Hultgren) tool mfrs 36 Whipple
" Otto J (Kate) retd h50 Chester
" S Ellen Mrs clk MPA r Millbury
" Sylvia M clk MPA r79 West
Hultin Gertrude L Mrs emp Astra r Holden
" Harold H sht mtl wkr N Co r Holden
" Ingrid V sten Riley Stoker r Holden
" Ronald W (Dorothy) bldg contr 11 Carlstad h do
" Roy W (Gertrude L) turret lathe opr Sleeper & Hartley r Holden
" Russell h37 Main
Hultman Elliot C eng Geo J Meyer Mfg r Leicester
" I Lillemor emp Astra r83 Bay State rd
" Irene R clnr Armstron Nursing Home r338 Granite
" Jos (Lena M) supvr WG h328 Granite
Hultquist Albert J (Pamela) mchn h39 Tower
" Augusta M (wid Carl O) h103 Greenwood

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" Esther E mach opr US Envelope h15 Knight
" Everett A (Barbara) v-pres Ken Wild Co Inc r Holden
" Florence Mrs pkr Worc Felt Pad r Whitinsville
Humes John F (Eleanor) mtce Mass Steel Treating r N Grafton
" Marjorie L Mrs nurse Saul Lerner r12 Birch Hill rd
" Norman S (Marjorie L) supvr Heald h12 Birch Hill rd
" Richd H mach C&K r Upton
Humfryes Edw F (May G) auxiliary mn Mass Elec h16 Teddy rd
Humiston Everett L (Irene) emp Saltsky Alloys h12 Northampton
Hummel Albert F (Yetta E) mgr Mr B's Shoes h120 S Flagg
" Fredk G asst sls mgr Riley Stoker r Northboro
Humphrey see also Humphries
" Albert G formn Woodbury & Co r Brookfield
" Anna L hairdrsr Patio Beauty Salon r Northboro
" Cath M (wid Edw P) insulater H H Brown Shoe h5 New Vista la
" Chas E (Alice) emp WG (Grafton) h34 Hope av
" Cheryl J studt r80 Lakewood
" Clara embosser Frank H Pfeiffer Co r5 Beaver
" Donna J opr NET&T r53 Freeland
" Elena opr Albert J Rovezzi r Leicester
" Florence (wid Henry) r1016½ Main
" G Wm (Jesse G) slsmn Worc Baking h80 Lakewood
" Geo A jr (Hildur E) formn USS h28 Ivernia rd
" Geo A III studt r28 Ivernia rd
" Geo L (Mary A) lever mn WG h120 Laureldale rd
" Geo L jr studt r120 Laureldale rd
" Geo W (Jessie) slsmn Worc Baking r80 Lakewood
" Isabel retd r906a Main
" Jessie G Mrs biller Richard Healy Co r80 Lakewood
" John V (Rita) prntr h6 Ripley
" Judith G clk Melville Shoe r80 Lakewood
" Mary E stock clk Klothes Kennel r120 Laureldale rd
" Raymond W carrier PO r93 Downing
" Rita M Mrs supvr Security Accept r6 Ripley
" Scott D (Paula) drftsmn Worcester Valve r Auburn
" Scott D mach Geo Wright r12 Neptune rd
" Viola W (wid Chas) r14 Lexington
" Volney L (Marjorie E) methods eng Heald h12 Neptune rd
" Wm J (Mary E) formn John J Adams Co h53 Freeland
Humphreys Clara R embosser Frank H Pfeiffer Shoe h5 Beaver
" Grace H Mrs emp Astra r93 Downing
" Wm R (Grace) carrier PO h93 Downing
Humphries Chas (Anna C) drftsmn Rex Chain Belt h17 Douglas
" Geo J (Theresa E) mach Geo J Meyer Mfg h12 Sutton la
" Isabelle clk N Co r Cherry Valley
" Jas F (Shirley G) plant eng Rex Chain Belt h19 Wild Rose av
" Thos (Cath) retd h17 Douglas
Hung John H (Josephine L) studt r24 Richards
Hungerford Martha A slsmn Bancroft Vista r Holden
Hunnewell David C pres Tailored Tools r Sharon

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EXHIBIT C.

PORNOGRAPHY, MAILING LISTS AND AMERICA'S CHILDREN

Testimony of Hon. Clement J. Zablocki of Wisconsin Before the Senate Judiciary Subcommittee to Investigate Juvenile Delinquency

Thursday, February 9, 1967

MR. ZABLOCKI: At the outset, Mr. Chairman, I wish to commend you and the members of your subcommittee for holding this series of hearings on a subject which has important implications for American society and which has in the past received insufficient attention and consideration.

While it is true that other Congressional inquiries have touched upon the links between mailing lists, pornography and our Nation's youngsters, your subcommittee investigation is the first to meet the problem squarely.

It is my sincere hope that because of these hearings, public and congressional opinion will be aroused to the point where needed, remedial legislation will be passed.

My remarks today, Mr. Chairman, will be directed toward the relationships between mailing lists, pornography and juveniles as I have come to see them after months of study.

It is my intention to cite specific, sometimes shocking, instances which have come to my attention. Finally, I will outline and recommend a legislative proposal designed to curtail the flow of mail order pornography to American children.

Mr. Chairman, mailing lists are big business and big money—for the most part legitimate. The business of compiling and renting out lists is estimated to have an annual dollar volume in the hundreds of millions. Further, mailing lists are the foundation stones on which the entire direct-mail industry is built. That industry now entails an estimated annual investment of $2.4 *billion*, an

amount equivalent to the advertising expenditures on television.

Because of the lucrative nature of the trade, a good deal of ingenuity and enterprise has been expended in gathering names and addresses for mailing lists. This subject was recently explored in an engrossing article entitled "You Can't Wear Out a List" by Calvin Trillin in the *New Yorker* Magazine of September 24, 1966.

Mr. Trillin describes how telephone books, magazine subscription lists, professional directories, bell captains and even the U.S. Census Bureau are used as sources for information.

In addition, mailing list brokers and compilers have refined these millions of names into highly specific categories according to age, income and occupational background.

For example, in reviewing mailing list catalogues in my possession, I have found that a list of 918 pedigreed swine breeders can be had for $57.50, a list of 27 deaf missionaries for $8.00 and the names of 24 zwieback manufacturers for $10.50.

You may be pleased to know, Mr. Chairman, that $10.50 also will buy a list of 84 doughnut bakers living in your home state of Connecticut. And that a Senator's name and address sells for about 15 cents, while a member of the House is only worth a nickel.

If one so desires, he can obtain a list of 212,000 attorneys, 99,000 dentists, and 259,000 doctors—all for about $25 per thousand.

Where do these names come from? One prime source is the professional associations to which these men belong. The American Medical Association, for example, allows several list complaines to use its nationwide roster of members in return for a royalty of $3.50 per thousand names on each rental.

This practice by the A.M.A. led to a most embarrassing situation for the organization two years ago.

Although it is not generally known, every active doctor in the United States received advertisements for *Eros* magazine, the Liaison Newsletter and the Housewife's Handbook on Selective Promiscuity—publications which

the United States Supreme Court decided were obscene in an important decision last year.

This is what Mr. Justice Brennan's majority decision had to say about the advertisements—the ads, not the materials themselves—which every American physician found in his mailbox:

"The 'leer of the sensualist' also permeates the advertising for the three publications. The circulars sent for *Eros* and Liaison stressed the sexual candor of the respective publications and openly boasted that the publishers would take full advantage of what they regarded as unrestricted license allowed by law in the expression of sex and sexual matters." End of quote.

The A.M.A. apparently found out that Ralph Ginzburg, who published *Eros* and the other material, had used their list only after a flood of complaints from doctors all over the country poured into the Post Office Department. Postal authorities rightly assuming that the *Eros* firm had got hold of the organization's master roster, alerted the A.M.A.

Somewhat red-faced, the A.M.A. was forced to send letters of apology to doctors after halting the further use of its list by Ginzburg.

That did not deter Ginzburg who now faces a prison sentence of five years and $28,000 in fines. On the envelopes of some of his later advertising circulars, he had printed: "The A.M.A. does not want you to open this envelope."

This incident graphically points up the fact that individuals and organizations who rent their lists often have no idea of how they ultimately will be used.

For Ginzburg, the A.M.A. list undoubtedly had a golden look since in the direct-mail industry doctors are considered to "perform well"—that is, they pay their bills and generally renew magazine subscriptions.

Despite the good reputation of doctors, Ginzburg might well have preferred to send his materials to youngsters. If he had, he could have bought the use of a list of one million boys and one million girls for $30 per thousand.

There is good reason why a list of youngsters should be worth $5 more per thousand than lists of doctors, law-

yers or dentists: children make choicer customers. They are easier prey.

Testifying before a subcommittee of the House Post Office and Civil Service Committee several years ago, Mr. Robert F. DeLay put it this way about mail order solicitations to children: "They are very responsive. They receive very little other mail."

The sources for the names of youngsters include mail order houses, publishers of books, magazines and comics, and advertisers in youth publications. These sources have no more—and probably less—knowledge of and control over who buys the names they compile than the A.M.A. did in the *Eros* case.

Spokesmen for the direct-mail industry are quick to insist that individuals and firms who deal in names of young pepole are careful to screen what is sent to those on their lists. Yet the mechanics of transactions in the industry are such that constant and adequate screening is very difficult and often "after-the-fact."

The Direct Mail Advertising Ass'n contends that its own code of conduct provides a safeguard against pornographic mailings or suggestive ads going to children. Yet of about 60 major list brokers in the nation, only 28 are currently listed as members of the DMAA. There are, in addition, many more small operators who compile, buy and sell lists. Alan Drey, president of a large list brokerage house, has admitted that "Anybody can be a list broker or sell a mailing list," in testimony before the House Post Office and Civil Service Committee.

Further, there even have been problems with DMAA members who presumably subscribe to the organization's "Operating Standards of Practice." Section 11 of that code states "Mailings will not contain vulgar, immoral, profane or offensive matter nor will members use the mails to promote the sale of gambling devices, pornographic material or other matter not acceptable for mailing on moral grounds."

That sounds tough, doesn't it? It seems less so, however, when one considers that Ralph Ginzburg, convicted obscenity peddler, was a member of the DMAA and osten-

sibly was operating under its code when he flooded the U.S. mails with his ads for *Eros*.

The DMAA, in testimony before the House Post Office and Civil Service Committee has pointed with pride to its investigation of Ginzburg by an ethics committee prior to his federal conviction. Given less emphasis is the fact that Ginzburg was not *expelled* from DMAA but rather he was asked and *resigned* voluntarily.

In explaining how such a man could join the organization in the first place, a DMAA bulletin to members admitted that, "We have no way of knowing what a company is intending to mail when they apply for membership."

Another case has been brought to my attention by Mr. George Berdes, who as editor-director of the Marquette University Press in Milwaukee, turned over to me a copy of a brochure for a number of—quote—"sex-minded lists" —unquote—which he had received from Ed Burnett, Inc., of New York. Mr. Berdes, who is now my administrative assistant, also gave me an exchange of letters which he subsequently had with Mr. Burnett on the subject.

With your permission, Mr. Chairman, I would like to include in the Record at this point a copy of this list broker's ad and the correspondence.

* * * *

In reply to Mr. Berdes' objections, Mr. Burnett openly admitted he was selling sex and implied that such activities are justified because everyone is "sex minded." With such an attitude one wonders how carefully this list broker screens his lists to prevent young people from receiving unsolicited mail-order ads for sexually stimulating materials.

I had occasion to discuss this situation with Mr. DeLay, President of the DMAA. He admitted that Mr. Burnett was a member of his organization and that the two had discussed the propriety of Mr. Burnett's operation without coming to an agreement.

Yet Mr. DeLay did not indicate at that time that the ethics committee of his organization was investigating Mr. Burnett. Nor have I received any information since,

that would indicate that this broker has been expelled or asked to resign from the D.M.A.A.

My purpose here is not to denigrate or criticize the D.M.A.A., which undoubtedly does much for its members, but rather to point up two realities which are exemplified in the case I have cited:

First, because sex sells—and apparently sells very well—there will be brokers who will provide the mailing lists, lists which may well contain the names of young boys and girls.

Second, voluntary codes of ethics by business associations in the direct-mail field are largely ineffective in restraining those who wish to traffic in offensive materials.

At this point, let us lay rest to the contention of the smut peddlers that they do not intend their wares for children, but only for mature adults. In many of the "come on" ads, they send a notification that the materials are "for adults only" or the suggestion to "disregard if you are not 21."

These disclaimers are nothing but hedges against potential criticism. Their principal effect probably is to entice youngsters into thinking that they are being "grown up" by sending for the smutty pictures or literature.

The Post Office Department estimates that more than one million boys and girls in 1966 received unsolicited in the mails either pornography or ads for such materials. It is impossible to believe that all these mailings were only accidentally sent to young people.

In many cases, the smut merchants are interested in directly involving youngsters in their dirty game. In his series for the *Washington News* on this subject, Newsman Samuel Stafford told the story of a young boy right here in Washington, D.C., who answered an unsolicited ad, was "hooked," and ultimately blackmailed by the smut racketeers into selling pornography to his schoolmates.

When postal authorities finally caught up with the boy they found hidden under his bed some of the most obscene materials they had ever seen.

Along that same line was a case which occurred in my home state of Wisconsin because of the activities of Mrs.

R. V. Anderson, legislative chairman of the Federation of Women's Clubs, in investigating the nether world of pornography.

Through an ad in a magazine which Mrs. Anderson purchased in a grocery store, she learned of the publication called "Rogy's Personals." This sheet is—or rather was—a "pen pal" service for people seeking companionship with other people, often homosexuals or lesbians.

After consulting postal authorities, Mrs. Anderson, using the name of her 5-year old grandson, sent in an ad. She received dozens of replies, 13 from Wisconsin. All the letters were turned over to the postal authorities for investigation. As a result, two men were arrested and one federal employee lost his job.

The most disturbing thing about "Rogy's" and other such dealers is their unabashed interest in twisting the minds of young people in order to recruit them to perversion. Some of their books, for example, describe how to make a homosexual out of a normal person.

And a typical ad in Rogy's personals reads: "White male wants to meet and correspond with good looking teenage boys and boy movie stars . . . . . Will do anything you desire. Guarantee you a good time."

Since the Supreme Court decision in the *Mishkin* case, "Rogy"—Oscar Roganson—has been arrested and charged with three counts of possession, distribution and sale of obscene literature.

When Roganson was arrested, police seized index cards with the names and addresses of 6,000 "clients" from throughout the United States. There is evidence that Rogy regularly sold his roster of names to other smut peddlers.

* * * *

Mr. Chairman, from the incidents and statistics which I have related one thing, above all, becomes clear:

Our children become fair game for the smut-peddlers by the time they are old enough to write a letter, lick a stamp and reach the mail box.

No matter what they may send away for, there is a good chance their names may become a saleable commod-

ity, available to anyone, regardless of how tawdry may be his intentions and his wares.

The serious condition which this practice is causing in our Nation is clear. The complaints by parents to the Post Office Department have increased tremendously over the past several years.

A remedy must be found. In that belief I began a study of the problem early in 1964.

It became clear that any new federal legislation should be directed at the buying and selling of mailing lists. This is, so to speak, the bottleneck of a complicated and far-flung industry. A little prevention here might eliminate the need for more drastic remedies elsewhere.

On April 28, 1964, I first announced my intentions of introducing legislation to regulate and review mailing list transactions and mailing list brokers. A story appeared in the daily press and elicited a gratifying response from interested persons around the country.

I was particularly pleased by the reaction of the direct mail advertisers themselves. For example, the *Washington Newsletter* of the Direct Mail Advertising Association reported that many members of the Association volunteered that they would be quite willing to discuss in Washington my approach to the problem of mail-order pornography. *The Mail Marketing Newsletter*, another respected publication of the trade, gave its qualified endorsement to my proposal. In its July, 1964, issue the newsletter said:

> Although we have not seen the legislation, we believe that Representative Zablocki may have hit upon a practical means of discovering mailings that violate existing law prohibiting the mailing of pornographic material. There are literally thousands of small printers and letter-shops whose activities are impossible to keep under surveillance, but there are relatively few firms in the list business. No mailing can take place without a list, and therefore providing for inspection at the point where sale or exchange of lists takes place offers the most practical means of eliminating pornographic mailings.
>
> We believe Representative Zablocki's proposal offers more protection with less danger of damaging

legitimate advertisers than Representative Cunningham's (R.-Nebr.) approach which would permit the recipient to decide whether an individual mailing was "morally offensive" and to request that his name be removed from the mailer's list . . .

On January 18, 1965, I introduced my bill into the 89th Congress. The reception of the public and the direct mail industry was heartening. In February of that year I met with representatives of the direct mailers. They too have been concerned with the rising tide of smut being sent through the mails.

One of their chief concerns was that my bill, as written, did not cover persons who make lists from their own sources and use them to send pornography. At that meeting I agreed that the bill could be strengthened by including such persons and agreed to amend my bill in this regard.

The Post Office Department has also been favorable to this proposal. In early July I met with Postmaster General John Gronouski, Chief Postal Inspector Henry Montague, and Department Counsel Felix Sklagen to discuss the matter.

I found them very concerned about the problem. They informed me that the number of complaints from parents about this material being received in their homes had increased almost 300 percent in the past three years. Although the postal authorities have stepped up efforts at finding and having convicted these traffickers in filth, it appears that new effective legislation is needed.

The former Postmaster General endorsed the concept embodied in my bill and, together with experts on his staff, offered suggestions for improving and strengthening the measure. These were gratefully received.

Incorporating as it does the suggestions of concerned industry representatives and postal experts, the revised and amended version which I have introduced into the 90th Congress is, in my estimation, greatly strengthened and improved. It is H.R. 2382, which currently is pending before the House Post Office and Civil Service Committee. A similar proposal has been introduced in the Senate by the distinguished gentleman from Indiana, Mr. Bayh.

With your permission, Mr. Chairman, I would like to include at this point the text of the bill.

* * * *

The effects of this measure principally would be three:

First, it would provide the Post Office Department authorities with considerably more information about an industry which the Post Office has admitted having limited knowledge and information.

Second, it would assist officials in gaining information which would be useful in obtaining convictions under existing obscenity laws.

Third, the bill very likely would have an inhibiting effect on the smut peddlers. They would fear to keep the required records and yet if they failed to do so they could be liable for prosecution under the act itself.

I would also like to emphasize what my bill would *not* do:

First, it would not impose any kind of censorship. It does not call for determinations of what is offensive or obscene. It merely seeks to give to responsible authorities more information on the traffic in lists of addressees.

Second, the bill would not interfere with the operation of legitimate mailing list suppliers and buyers. Many of these conform to codes of ethics in their trade, and are careful about what kinds of materials are distributed to persons whose names are on their lists. The records which the firms would be required to keep under the bill are no different than those a business ordinarily has readily at hand.

Third, the bill would not eliminate mail-order pornography overnight, if enacted. It would require vigorous enforcement by the Post Office Department to stop irregularities in the transfer of mailing lists in order to shut the smut-peddlers off from their customary sources of names of potential customers. Prosecutions and other actions under already existing anti-obscenity laws would have to be continued in order to attack the mail order pornography problem on a broad front.

Mr. Chairman, the work being done by your subcommittee dramatically highlights the current problem in mail order smut and the need for an effective solution.

You are making it clear that the time has come for Congress to act to protect our most precious heritage—our young people—from being corrupted and perverted by those malefactors whose greed and baseness causes them to spread the lewd and lascivious, the salacious and the obscene, to every corner of our nation. It behooves us to act with dispatch. With each passing day more and more young people are faced with temptation which comes to them in the mail; more and more are touched by this corruption; more and more, I regret to say, fall into the hands of the smut-peddlers.

In a very real sense, Mr. Chairman, the possibility of attaining the Great Society depends on this issue. It will never be achieved if our citizenry is riddled with perversion and erotic self-indulgence. Our goal can only be attained if Americans are self-disciplined and sustained by principles of morality and justice. Let us, therefore, determine that the 90th Congress will not adjourn without having taken effective action to clear this pollution from our postal system.

* * * *

H.R. 2382

A bill to require mailing list brokers to register with the Postmaster General, and suppliers and buyers of mailing lists to furnish information to the Postmaster General with respect to their identity and transactions involving the sale or exchange of mailing lists, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That (a) chapter 53 of title 39, United States Code, relating to the several classes of mail, is amended by adding at the end thereof the following new section:

"4061. Registration of mailing list brokers; furnishing of information by suppliers, buyers, and users of mailing lists

"(a) Each broker engaged in the sale or exchange of mailing lists for profit shall register with the Postmaster General, within . . . . . days of enactment, a registra-

tion statement in such form and detail as the Postmaster General shall determine, respecting (1) the name under which he is or intends to do business, (2) the scope and general character of the business transacted or to be transacted, (3) the relationship, if any, of the mailing list operation with other business undertakings, (4) the location of his principal business office, and (5) the names and addresses of the directors and the chief executive officers where the broker is a corporation, association, partnership, or other such entity;

"(b) Each individual and each corporation, partnership, or other business organization or association using, buying, selling, leasing, renting, exchanging, or otherwise making available to others for profit any list of addresses or other similar mailing list shall on request furnish the Postmaster General, in such form and detail and at such time as he shall determine, information respecting (1) the name of the individual, corporation, partnership, or other business association or organization, and (2) the identity of individuals having a financial interest in any such organization or association, including the responsible officers and employees thereof. Records shall be kept for a period of not less than five years and postal officials upon request shall be permitted to examine such records and particulars of transactions or mailings pertaining to any such address or mailing list;

"(c) As used in this section—

"'broker' means any person who engages either for all or part of his time, directly or indirectly, as agent, dealer, or principal in the business of offering, buying, selling, or otherwise dealing or trading in mailing lists owned, rented, or used by another person;

"'registration statement' means the statement provided for in this section, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference;

"'supplier' shall mean to include broker, owner, and compiler'

"'buyer' shall mean any person who buys mailing lists or buys the use of such lists through leasing or renting agreements;

"'user' shall mean any person who uses mailing lists supplied by someone else, or the person performing the acts and assuming the duties of handling, compiling, sending by mail or by messenger list of names to be used for his own benefit, or the benefit of another, for profit;

"(d) The Postmaster General shall make appropriate rules and regulations to carry out the purposes of this section.".

(b) The table of contents of such chapter 53 is amended by inserting:

"4061. Registration of mailing list brokers; furnishing of information by suppliers, buyers, and users of mailing lists."

immediately below

"4060. Foreign publications free from customs duty."

Sec. 2. (a) Chapter 83 of title 18, United States Code, relating to offenses against the postal service, is amended by adding at the end thereof the following new section:

"1735. Mailing list brokers, suppliers, buyers, and users

"whoever, being required by section 4061 of title 39, United States Code to furnish information to the Postmaster General, fails or refuses to furnish such information as the Postmaster General shall request under such section, shall be fined not more then $5,000 or imprisoned not to exceed one year, or both."

(b) The table of contents of such chapter 83 is amended by inserting

"1735. Mailing list brokers, suppliers, buyers, and users."

immediately below

"1734. Editorials and other matter as 'advertisements'."

Sec. 3. The foregoing provisions of this Act shall become effective on the day following the date of enactment of this Act.

EXHIBIT D.

ONWARD AND UPWARD WITH THE ARTS
YOU CAN'T WEAR OUT A LIST

"There's a certain cachet in getting mail," Harry Maginnis, the president of the Associated Third Class Mail Users, has said. "If you don't get any mail, you're probably a credit risk and uneducated. A deadbeat. A bum. A guy who doesn't get any mail, watch out for him." Anyone who does get mail, on the other hand, probably has a name that is considered valuable enough to be rented out, or valuable enough to be traded for an equally treasured name. He has been included in a marketable mailing list. Anyone doubting Maginnis's Law need only read through some of the descriptions of lists that are distributed to potential customers by list brokers, or glance through the advertisements that sometimes appear in a trade magazine called the *Reporter of Direct Mail Advertising*; the man they depict is in no danger of being categorized as a bum. His financial status is attested to every time his name is rented out, for two and a half cents, as an American Express credit-card holder ("88% earn over $10,000 a year") or, for three cents, as a key-holder in Playboy Clubs International ("All paid $25.00 to $50.00 for membership and are credit rated and in above average income levels"). His willingness to travel may be certified by his name's having been rented out, for two cents, as a former guest at a Schine Hotel ("High-income traveller and resort vacationist") or, also for two cents, as a former subscriber to *Commentary* ("70% travelled abroad in past five years, 20% visited Israel, 95.3% travel fifty miles or more a year") or, for about a penny and a half, as a person who has had some correspondence with the Florida Chamber of Commerce ("Men and women who wrote to the Florida Chamber of Commerce for information on where to spend vacations or where to retire in Florida"). He has probably been stamped as a participant in the cultural explosion; he may have been rented out, for two and a half cents, as a donor to the Musicians' Aid Society

("Particularly interested in cultural appeals") or, for one and three-quarters cents, as a former subscriber to the *Reporter* ("Active, cultured individuals") or a customer of Brentano's ("Cultured well-to-do individuals") or, for three cents, as a current subscriber to the *Partisan Review* ("Heavy readers"). A recipient of third-class mail may have been dashing enough to have had his name rented out by Bachelor Party Tours ("The emphasis is on fun, and most of these travellers are single"), or prudent enough to have been rented out as a former policyholder with National Liberty Life Insurance ("Non-drinkers' health-and-accident insurance policy at a preferred rate"). Even if someone receives mail only because he is in the phone book, it speaks well for him. The O. E. McIntyre company, which compiles lists from phone books, notes in its catalogue that "telephone owners have more than twice the income of non-telephone owners." In other words, anyone whose name has been rented out by the owner of each of these lists may think that he has merely received a dozen offers from record clubs and magazines and credit-card companies, but what he has really been sent is certification that he is a wealthy, cultured, dashing, prudent, credit-checked American. And the people who have provided him with that certification have made only about twenty-five cents from his name.

The mailing-list business is a concentrate of American free enterprise. No one tries harder than a mailing-list broker to emulate the Midwestern meat-packer who managed to sell everything but the squeal. No other businessman is so horrified by the sight of a potential source of profit lying fallow. A broker or a compiler of mailing lists is often haunted by this sense of waste, because he can see a potential source of profit where others see only a list of names. And he can see a list of names where others see only a method of licensing automobiles or delivering magazines or giving away free recipe booklets. In the eyes of someone in the list business, no transaction is quite what it appears to be to the less advanced practitioner of free enterprise; it is what it appears to be plus a list. A mailing-list broker assumes that people who have enough in common to be on the same list have enough in common

to constitute an excellent market for some product, and he is likely to feel professionally unfulfilled until he figures out what the product is. Arthur Martin Karl, of Names Unlimited, a veteran list broker, has even managed to find a use for the No List. The No List is the result of a phenomenally successful direct-mail technique pioneered by the *Reader's Digest* and known as a sweepstakes. The recipient of a sweepstakes mailing can send in a reply card that makes him eligible to win one of a million dollars' or so worth of prizes offered in the sweepstakes drawing and, at the same time, carries his order for whatever merchandise is being sold. He can also say no—that he would not like to buy the merchandise but would just as soon have his reply-card number remain in the sweepstakes anyway. The No option prevents the sweepstakes from being an illegal lottery that requires a purchase as the price of entry; also, as it happens, the inclusion of the No option always increases the number of people who say yes—even when no sweepstakes is involved and the person who sends in a No card has nothing whatever to gain. Some merchants might consider this double blessing enough to justify the existence of the No option; a list broker would look upon such merchants as people who are willing to tolerate unconscionable waste. The returned Nos are a list, and a list that is not being rented out is a by-product wasted. But who could use a No List? It is true that the people on it demonstrated some activity by taking the trouble to mail in the reply card—and activity of any sort is highly valued in the list business—but the only other characteristic they had in common was a willingness to walk to the mailbox in order to take a chance on winning something for nothing. Karl eventually thought of the Puzzle Lovers Club, an organization whose members receive cash prizes for solving puzzles published in the *Puzzle Lovers Newspaper*. The Puzzle Lovers Club was willing to send a test mailing to three thousand names on one of the No Lists that Karl offered. The percentage of response was so high that the club ordered twenty-five thousand more No List names, and then five hundred thousand more.

Anyone who spends much time among list brokers eventually begins to suspect that a list broker can find a use for any list. The suspicion grows that if somebody defied Maginnis's Law and wrote in to demand that his name be taken off a list, he would be placed on a list of people who have demanded that their names be taken off lists.

"No, there's no use for that one," a list broker told a visitor recently.

"How about renting it out as a soreheads list?" the visitor asked. "It might do for selling products to people who want to be left alone—ammonia to squirt in dogs' eyes, or electrified fences, maybe."

The list broker smiled and shook his head, and made a note on his desk pad.

People in the list business find it natural to turn a dollar on what less resourceful people would probably not recognize as a marketable commodity. The O. E. McIntyre company, for instance, which has annual sales of several million dollars, has built its entire business on the names in phone books and statistical information available to anybody from the United States Bureau of the Census. Bernard Fixler, of Creative Mailing Service—a Long Island company that specializes in compiling business and executive lists—has said, "We have forty-three hundred telephone books and Dun & Bradstreet, and for the main part of our business that's all we need." List compilers often take the trouble to copy down what is available to everybody anyway. Then they sell it. They go to Washington to copy down the names of contributors to campaign funds, which both parties are required to disclose after each Presidential campaign, or they copy down the names of the people in the New York telephone directory who have more than one telephone number. It is common for a list compiler to sell the names of the members of a professional society merely by making the society roster into a list.

List brokers, possessing the optimism of the truly enterprising, are only briefly distressed if a list of marketable names seems unavailable; often they can simply hunt around and turn up a list that contains the same names. Financial-advisory services are not permitted to advertise in the *Wall Street Journal* and cannot rent the list of cur-

rent *Journal* subscribers. (The *Journal* does, however, trade the names of former subscribers, known in the business as "expires," with other publications.) However, a financial-advisory service *can* rent a list like "Mail Order Buyers from *Wall Street Journal*," which is composed of people who have purchased sports equipment and other merchandise from a company named Scott-Mitchell by answering its advertisements in the *Wall Street Journal*. Scott-Mitchell customers make up only a small percentage of the *Journal's* readership, of course, but they have demonstrated that in addition to being people who read the paper they are people who are willing to buy through the mail—the sort of activity most highly valued in the list business. If a list broker cannot find an alternate list, a list compiler can always create one. Not long ago, Herbert Odza, the chairman of the Dunhill International List Company and one of the industry's most aggressive compilers, happened to mention to a reporter a list of contributors to the United Jewish Appeal.

"But I just spoke to the U.J.A. yesterday," the reporter said. "They told me they don't rent their list to anyone. They don't even trade it."

"That's right," Odza said.

"Then how did you get it?"

Odza looked disappointed, as if he found it distressing that anyone could fail to see such an obvious bit of business strategy. Eventually, he said, "Well, the U.J.A. has dinners attended by the big contributors, right?"

"So you subscribe to the Jewish press, and if it covers the dinner you get some of the names."

Odza smiled patiently and shook his head. "There are only twelve hundred hotels with banquet halls used for that kind of dinner. They all print programs for the dinner, and the bell captain gets a copy of the program, right?"

"Right."

"Well, we have arrangements with nine hundred of the twelve hundred bell captains. Then we add to that information whatever is in the U.J.A. newsletter, and we subscribe to all the papers. We put together a list of eighteen thousand of the largest contributors. Of course, we don't sell it as the U.J.A. list. We call it 'Large Contributors to a Jewish Charity' or something."

The list business easily meets the most important test of free enterprise: the profit margin is enormous, and business is booming. According to list brokers, companies can make so much money renting out lists of their customers that some mail-order firms are willing to break even on their merchandise and make their profits from the rent brought in by their lists. People in the trade estimate that the Diners' Club, which now has a list of about a million names, makes about five hundred thousand dollars a year —almost pure profit—from renting it out; an executive vice-president of the Diners' Club acknowledges that the figure is "in the hundreds of thousands." The actual business of compiling and renting out lists is estimated to have an annual dollar volume in the hundreds of millions, and it forms the basis of the entire direct-mail industry, which now draws about as much advertising expenditure as television. In the forties, mailers invested some two hundred and fifty million dollars a year in production costs and postage for direct mail; in 1965 the figure was two billion four hundred and eight million. The volume of third-class mail has gone from roughly four billion pieces a year in the forties to roughly twenty billion pieces last year. About fifteen billion pieces of that were bulk-rate third-class mail—and every one of those fifteen billion pieces owed its existence to a list.

As purists in free enterprise, list brokers often have to help along the ordinary American businessman who, probably through ignorance rather than any desire to slow up the economy, may be neglecting an immensely marketable by-product of his business. In the writings and conversation of list brokers, a scenario of enlightenment emerges:

"The walls are coming down," an advertisement for Lewis Kleid, one of the leading list brokers, declares. "Big national companies are rapidly recognizing the income potential from the rental (not sale) of consumer-list properties. This includes: coupons from space advertising, warranty registrations, premium buyers, contest entrants, product inquiry, and customer names."

"But I can't go around renting out my own customers," says the Unenlightened One.

"Some mailers . . . . don't want to subject 'their' customers to a lot of extra mail," says a direct-mail newsletter called *Briefs from Bringe.* "There is a feeling that rental would be 'breaking faith' with the customer. The assumption is that the mailer can control the mail his customer receives, and even that he has some right or duty to do so. It overlooks the fact that the customer receives mail from many sources, wants to get such mail, and has not given anyone the authority to decide what he should or should not receive."

"I'd be crazy to give out the names of my customers to somebody else."

"You wouldn't be giving out anything," say the brokers. "You would rent out the names on a one-use basis; either the renter sends his envelopes to you for addressing or you send him labels. The only names of yours he has when it's over are the ones who have responded to his mailing piece, and that's probably only two or three per cent. You wouldn't rent out to competitors."

"How about all that smut-through-the-mails I'm always reading about?"

"The renter will submit his mailing piece to you for approval, and if you don't approve, or if you want to use the list yourself that week, you don't have to rent it out."

"It just occurred to me that even someone with an inoffensive mailing piece could copy the names off the labels I send him and use them forever, the thief."

"Never. In the first place, there is a great deal of trust in this business. In the second place, you can require a guarantee in the contract that this won't happen. In the third place, anyone who rents out his list keeps dummy names on it, so that anyone who is tempted to steal it knows that he is about to send one of his mailing pieces to a misspelled aunt or a peculiarly initialled secretary of his victim, who will have him ostracized."

"Sending my customers all those other offers is obviously going to cut down what they buy from me."

"List owners have a tendency to overprotect their names and to resist frequent usage," Lewis Kleid has written. "Mail-order experts contend, however, that you can't wear out a list. If anything, frequent mailings help condition and improve the quality of the names."

The most irresistible argument that a businessman can hear from a list broker concerns profit. The profit margin in list renting is what might be expected of a business that takes free enterprise seriously. Anyone who has a list of reasonably desirable names can usually rent it out for something like twenty dollars for every thousand names. That amounts to ten thousand dollars for a list of five hundred thousand names, and, except for a broker's fee of twenty per cent and expenses of two or three dollars per thousand for addressing, it is pure profit. "The company which fails to seek revenue from its names is doing its profit picture an injustice," the Kleid advertisement says. "For a company which nets ten per cent, a hundred thousand dollars in list-rental income is equivalent to a million dollars in sales (the hard way)."

Some firms are so anxious to avoid doing their profit picture an injustice that they market the names of their customers with almost as much energy as they devote to merchandising their principal product. At a congressional hearing in 1963, the direct-mail manager of McGraw-Hill testified that his company had two hundred and ten lists available for rental. Until recently, McGraw-Hill published a catalogue just of its own lists. The list manager of Doubleday estimates that his firm has thirteen million names available for rental. Sunset House, a California company that sells a variety of merchandise through the mail, now publishes its own brochure describing the various ways in which its three and a half million buyers can be sliced up to meet the renter's specifications. Anyone renting Sunset House customers can select them by geographical regions or states, and can rent only the names of people who live in large cities, or only the names of people who do not. The renter can select the names of people who bought something from Sunset House after seeing an advertisement in a newspaper or magazine, or of people who responded to a mail-order catalogue. He can rent the names of people who have made more than one purchase, or of people who have purchased recently. ("Fresh" names are prized among its users.) The Sunset House list can be sliced up in so many ways that Arthur Karl—who, like most list brokers, keeps a dummy name on many lists in

order to follow the movement in the trade—has to maintain six buyers of Sunset House merchandise across the country just to keep track. Anticipating some of the suspicions that mailers harbor about any list they are about to rent, the Sunset House brochure even includes a statement from an independent auditor that the size and description of the list have been fairly stated, and a guarantee from Sunset House that the list is "cleaned" five times a year. (Because about twenty per cent of the population moves every year, a list will soon include many names with wrong addresses—known in the trade as "nixies"—unless these names are cleaned off regularly. Undeliverable third-class mail is ordinarly thrown away by the post office, so in order to clean a list the mailer has to place a "Return Requested" notice on the envelopes of a mailing—guaranteeing the post office that he will pay an eight-cent fee for every piece that is returned—and then remove the nixies from the list.)

Many corporations have always sent mailings to their own lists—magazine publishers like Time, Inc., and the *Reader's Digest* have found that their lists constitute ready-made markets for expansion into book publishing and record selling—and, to some extent, the Lewis Kleid advertisement is correct in stating that the walls against renting out customers to other companies are coming down. "Data cards"—the five-by-eight cards that brokers circulate on each list they are offering—now exist for such respectable organizations as the Harvard University Press, the Polaroid Corporation (customers who have returned warranties), the New School of Social Research, Mutual of Omaha (purchasers of air-travel insurance), and the Modern Language Association of America. Still, there is a reluctance on the part of some list owners to rent out their lists on the open market, and a good deal of business is carried on through informal agreements that do not involve brokers. Some firms that do deal through brokers prefer to rent out their lists anonymously, the result being data cards on lists such as "Donors to a Liberal Cause" ("Liberal and mostly intellectual individuals who believe in civil rights"), or "Subscribers to Stock Brokerage House Newsletter," or "Buyers of an Item Used in the Graduation

Ceremony" ("The character of the purchase immediately preselects this group as being among the graduates of the better Catholic, private, and public grade and junior high schools"). Large corporations that have made a business of renting out their lists often seem to find some way in which they are not in the business—some aspect of list renting that they would never indulge in. "We don't have salesmen selling our list, the way American Express does," says Matty Simmons, an executive vice-president of the Diners' Club.

"We don't pay brokers a brokerage fee for renting out our list, the way the Diners' Club does," says the man at American Express who is in charge of finding renters for the credit-card list. "We really do this more as a service to our customers. We're really not in the list business, the way somebody like Dun & Bradstreet is."

"We are not in the list business," says George Paul, a public-relations man at Dun & Bradstreet. "Get that out of your mind."

(The Diners' Club list is rented out through brokers. American Express is one of the new firms that do not pay brokers' fees, but, unlike the Diners' Club, it merchandises its own list vigorously through salesmen and advertisements in the *Reporter of Direct Mail Advertising*. Dun & Bradstreet has been in what everybody else considers the list business since 1964—it employs list salesmen and publishes a catalogue of its lists—but its public-relations department does not like to use the term.)

Arthur Martin Karl has said, "An individual act always indicates a predisposition to perform a related act." People who have asked for a TWA travel booklet, or have sent in money to pay for the minature license plates they received from the Disabled American Veterans, or have opened charge accounts at Peck & Peck have, in the eyes of a list broker, held up their hands and challenged him to find an act that is related. Some connections are, of course, obvious. Anyone who wants to sell a food item through the mail is likely to be offered such lists as S. S. Pierce customers, former subscribers to *Gourmet*, mail-order customers of the Wisconsin Cheesemakers' Guild,

members of the Society of Gourmets, and buyers of any one of a dozen cookbooks. A firm selling automobile accessories can choose among fifty or sixty lists in the Auto Classification provided by Jack Oldstein, of Dependable Mailing Lists—from forty thousand people who have purchased a battery additive from the Campbell-Smith company to fifty-one thousand who are members of the Automobile Club of Washington. Anyone who wants to sell a book that happens to deal in some way with sex may try to rent the list of people who have bought "The Ravishers" and other books from Ignis Company and Marital Publications ("Sex Book Buyers"), or those who have bought one or another of Albert Ellis's books from Lyle Stuart, Inc. ("Dr. Albert Ellis' Sex Book Buyers"), or those who have bought books from Grove Press ("Most of the classics, including the writings of controversial authose such as D. H. Lawrence, Henry Miller, and others").

Although a list is created or enlarged every time a list is used—the names of the people who respond to the mailing become the property of the list renter—a heavy mailer can soon run out of names in the obvious categories and must then start looking for connections further afield. Sometimes the connection is only one step away. In selling self-help books, Doubleday does well with a list of people who have pruchased rapid-reading kits from the Better Reading Program—people who presumably want to help themselves and also need books in order to utilize their improved reading skills. The "list universe" of the Puzzle Lovers Club—that is, all the lists that regularly unearth a profitable percentage of puzzle lovers—includes not only the No List but almost any list having to do with astrology. Books on birds have been successfully sold to a list of people who have purchased binoculars by mail—a list that itself may have been built partly from the replies to a binocular offer mailed to people who had purchased books on birds. A *Wall Street Journal* circulation specialist has been quoted as saying that the list of subscribers to *Playboy* was the best list the *Journal* ever used. Mailers are constantly testing lists—mailing to a few thousand names on each one and keying the reply cards to measure results—and anyone who is willing to experiment can

occasionally stumble onto connections that would not have appeared so obvious before they were demonstrated. Boyce Morgan, the director of sales for the Kiplinger company, has said, "In the forties, we were using mostly investment lists for our Washington newsletter. Then I tried some crazy testing of other lists. One of them was people who had a bought Klipette, a device to remove superfluous hair from the nose. It was a dilly. Why did it work? Well, first, people of an age to have hair in their nose and ears might be the ones we were looking for, and then it does show a certain fastidiousness. In a way, it was a back-door look into the executive suite."

The best list that has ever been used by the Republican National Committee is, not surprisingly, a Doubleday list of people who purchased "Six Crises," by Richard M. Nixon. Unfortunately for the Republicans, the list contains only about fifteen thousand names. The Republicans have had good results with expensive-gift lists, but their most remarkable success was with the Kozak Drywash list—advertised by Kozak as a list of half a million "upper-income men and women who buy Kozak Drywash Cloths by mail to keep their expensive cars spotlessly clean every day the sun shines." According to the Kozak company, the National Committee found Drywash customers so responsive that it rented the list twice during the 1964 campaign. This might be precisely the Democrats' image of a Republican—a miserly old man standing in front of his two-car garage scrubbing down his expensive car, too stiff to get himself a bit wet while doing it—but the Kozak company says that there are more Democrats on the list than Republicans, that the list has worked for American Heritage books as well as for the *Wall Street Journal*, and that it would work just as well for the Democratic National Committee if the Democrats would only try it. But Guy Yolton, the direct-mail consultant who has been advising the Republicans, says, "There definitely is a connection. People who take care of their things tend to be the type of conservatives who lean toward the Republican Party. We're now trying another cleaning-rag list, and also a list of people who bought plastic garages to cover their cars. Maybe people who buy burglar alarms would

be good, if we can find a list of them, or automatic sprinkler systems, or home fire extinguishers."

There is always disagreement in the list business about what kind of lists work best for what kind of products—partly because there are always other variables, such as the cleanliness of the list, the attractiveness of the mailing piece, and the price of the items offered. A layman wandering through the list business is often tempted to make some leaps of amateur psychology. Recently, while talking to a visitor, Karl Brussel, who sells books—usually about sex—through the mails, was leafing through the lists he had used for selling "An ABZ of Love." He noted that a list of people who bought automobile accessories had worked very well. Then he turned a few more pages in his scrapbook and found that he had also had great success with purchasers of night-driving glasses.

"You should try purchasers of hood ornaments and you'll hit the packpot," his visitor said.

"No, I don't think it would make much difference," said Brussel. "Sometimes I think I could toss all the cards up in the air and use the ones on top to sell my books. This is a lonely, fractured society, and people are reaching out." Brussel was also successful in selling "An ABZ of Love" to a list of Vermont ski enthusiasts and to alumni of the Harvard Business School.

Some lists are so responsive that an offer in a completely unconnected field is likely to draw a response from a profitable percentage of the names—a profitable percentage in the direct-mail business being perhaps as low as two or three per cent, depending on the product and its price. The subscription list of *Eros*, now cleaned down to a hundred and ten thousand names, rents for thirty-five dollars a thousand and is so effective at selling expensive merchandise that anyone who wants to rent it must wait his turn. The name most often mentioned by brokers when the subject of "hot lists" comes up is Ambassador Leather Goods, one of the free-enterprise success stories of the list business. Only about five years ago, a couple in Niagara Falls, Mr. and Mrs. Murray Hall, first offered by mail a walletlike item called the Continental, which had windows for twelve credit cards, a money slit that could easily

accommodate the small amount of cash that anybody with that many credit cards was likely to carry, and free "personalization" (initials) in "14kt. raised gold-plate." The Continental was an immediate success. The Halls—using rented lists and the steadily increasing list of their own customers—went on to develop a full line of wallets and other leather goods. At the same time, they developed a list of five hundred thousand customers who are likely to buy anything offered them—from clothing to magazine subscriptions. One list broker said recently that anything that cannot be sold to the Ambassador Leather Goods list or to the subscription list of a health magazine called *Prevention* ("Mature, intelligent men and women seeking a constructive personal health program") cannot be sold through the mail.

Many list brokers believe that the most significant bond that holds together the people on a mail-order list is not the particular product they bought but the fact that they bought it by mail. The mail habit is considered important enough to have a value in the market. The Curtis Publishing Company, for instance, one of the relatively few large magazine publishers that rent out lists of current subscribers, gets five dollars per thousand more for subscribers who ordered through the mail than for subscribers who ordered through news agents. There is little argument in the list business that a list of mail-order customers is more responsive than a list reflecting any other common activity. However, the rest of the population is not forgotten; it is compiled. People on compiled lists have preselected themselves as lawyers or mothers or boat owners or plant managers or phone users or high-school seniors without having had to go near a mailbox. There are times, of course, when a compiled list works better than a mail-order list, and other times when mailers prefer to know more about their potential customers than a mail-order list can tell them. Magazines, for instance, are often concerned about gaining circulation among people of a certain age or income, so that surveys of their readership will produce the type of audience that advertisers are trying to reach, and, according to Margaret Hill, of *Time's* circulation department, "All we know about someone on a mail-

order list is that he's bought false teeth or something." Even in cases where mail-order lists are preferable, most heavy mailers use up the names on them and have to turn to compiled lists.

Compiled lists are produced in a flurry of individual initiative. "Everybody is in business locally," says Jack Oldstein. "A county clerk has four carbons, and he's running a little list business. I heard of a guy in New Jersey who was doing homeowners through mortgage papers and other records, and when I offered to market the list for him for twenty dollars a thousand he laughed at me. He's getting as much as a dollar a name from the local milk company." Almost anything that requires a license or a permit—dogs, marriages, barbers, swimming pools—is a matter of public record and is probably being noted down by a list compiler or an energetic part-timer. There is said to be one independent operator who makes a specialty of collecting the names of people who have been brought to court for non-payment of debts and then selling the names to loan companies. There are firms that take pride in being able to compile every conveivable type of list, and there are specialized firms, with names like Catholic Lists, Inc.; the Educational Directory; Teen-Mail, Inc.; and Investors' Listing Company. A low-salaried employee of a bank that acts as a registrar for a large corporation could offer a list of the corporation's shareholders to a stockbroker without going through any kind of list company.

"If it's a printed list, it's available," Standley Woodruff, of the Ed Burnett list-compiling company, said not long ago. "Anything on paper is fair game." Woodruff has a corollary to cover anything that is not on paper: "Anything is available if you're willing to pay the price per name it costs to compile it." Herbert Odza has always recognized the necessity of going to some lengths to acquire certain names. "When there's a proxy fight for control of a company, the company has to turn over the list of its stockholders to the court, and you can buy a copy of that," he said recently. "It's not illegal and not immoral, although it might be unethical. Birth names are usually bought from somebody in the hospital administration of-

fice. This type of thing is being done every day. In business, you must do things like this. A lawyer asks a question that he knows the court will strike from the record, but he wants the jury to hear it. You might think this is unethical, but it happens every day." In this diverse marketplace, most established list compilers concentrate not on underpaid clerks but on such widely distributed documents as trade directories, annual reports, and association rosters; their only subterfuge is to request a copy of a report or a roster in the name of a research company or a library or a student doing a research paper. The library of directories that a list compiler accumulates in this quest is often so extensive that he lends volumes to orthodox business libraries—although he would, of course, prefer to trade for a directory he doesn't have, so he could copy it during the transaction.

As practitioners of private enterprise, veteran list compilers, such as Jules Sherman, of Dependable Mailing Lists, are at their most impressive when they are squeezing marketable names from a document that most citizens would consider of limited interest and no commercial value. In the hands of Jules Sherman, a concert program from the Denver Symphony Society is a treasure. It has a list of patrons. It has a list of sponsors. It has a list of sustaining members, subscribing members, and contributing members. And Jules Sherman has a Denver telephone book. He also has the annual reports of a number of other symphonies, and a telephone book to match each one of them. Compilers are constantly improving what they can do with directories. Creative Mailing Service can now mine the standard directories of lawyers in a way that will send a mailing piece to only one lawyer in each firm—and the customer has a choice of reaching the senior partner or the man next in seniority or the man after that. If asked to put together a "custom-compiled" list, compilers are happy to extend their search far beyond the directories. For the Dictaphone Corporation, Ed Burnett once put together a list of "Business and Professional Markets (Individuals)" that drew names from nearly a hundred sources, including lists of yacht owners, church executives, missle-project directors, vanity-press customers, veteri-

parians, and buyers of mailing lists. (Dictaphone could hope to recover some of the expense by means of its own list-rental business; it offers four or five different lists of its customers.) Dunhill, Odza's firm, has offered a list, originally compiled for Rolls-Royce, called "Socially and Financially Elite Families" ("Included in this list are: holders of boxes at the Met. Opera House, Owners of Boats over 40′ in length, Contributors of $500+ to the Senatorial Campaign of Jacob Javits, Millionaire Members of the N.Y.C. Social Register, and the top Real Estate Syndicators"). Odza says that he received so many requests for a list of union pension funds—institutions that have considerable money to invest—that he went to Washington, where all the funds are registered with the government, found a little-known regulation that permits public inspection of the papers on record, put six accountants to work copying down the information he wanted, and has since been renting the resultant list steadily for a dollar a name.

Efforts to compile marketable lists produce such collections as "Men with Expensive Hobbies," "Special Formula—Individuals of Above Average Income and/or Intelligence," "Wealthy Families with Teenage Children," and "Women in the New York Area with $100,000 or More in Holdings." Probably the most widely used compiled lists, though, are simple compilations by profession. The American Medical Association list of doctors—which is rented by several medical-list companies that the A.M.A. franchises in return for a royalty of three dollars and fifty cents per thousand names on each rental—is considered an excellent list not only for drug-company advertisements but for magazine subscriptions and merchandise. Magazine publishers occasionally speak of doctors as "performing well"—meaning that they can usually be depended on to pay their bills and renew their subscriptions. According to Guy Yolton, the Republican National Committee first ventured into direct mail by sending a fund appeal to doctors during the first debate on Medicare, and a fund appeal to people on financial lists during the debate on withholding taxes from dividends and bank interest. Both were

profitable. The *Army Times*' list of servicemen is also considered effective for merchandise and financial offers. The reason, some direct-mail specialists believe, is that Army bases are away from large shopping centers, and that servicemen have steady incomes; others think it is merely a matter of soldiers' looking forward to mail call. Army doctors who have bought credit-card wallets from Ambassador Leather Goods must dance through the dreams of list brokers.

Even in compiled lists, mailers crave some sign of activity. A particularly valued type of compiled list is one composed of men who have recently been promoted or have just joined a new company. Compilers such as Creative Mailing Service and Ed Burnett cull trade magazines and newspapers and gather up four or five thousand names a month to add to lists called "Men in Motion" or "Newly Promoted Executives." The attraction of a man in motion only begins with the raise that he presumably received. A man who has just been promoted is likely to think about his role in the company, and might want to buy a book on executive management or subscribe to *Fortune* or the *Wall Street Journal*, both of which find such lists effective. He might also be musing on his new role outside the office and have concluded that he has reached a station in life that is properly accompanied by a bit of culture—perhaps a record club or a book club. One of his most appealing qualities is that he probably has not been included on many lists at his new office address and might be happy to read whatever mail he gets.

Most of life's milestones are celebrated profitably by the list business. There is a steady demand for lists of engaged girls and newly married couples; there is even a data card on a list called "Life Begins at 40" ("Men and women over 40 who have reecntly become in-laws. Top market for luxury and impulse buying"). The most profitable milestone of all produces what is known in the trade as the Birth List—although it is actually a list not of births but of new parents. A businessman with a less profound understanding of free enterprise than exists in the list business might think that couples on the Birth List would make good customers for diaper services and baby

products, and he might even extend the analysis to include a greater use of detergents. This is quite valid, of course, and is used by owners of Birth Lists, but for them it is only the beginning. New fathers, for instance, are known to be good prospects for correspondence courses. Doubleday finds that new mothers are fairly likely to become customers of its Dollar Book Club. Having children is ordinarily an activity of young families, and the *Reader's Digest* has used the Birth List partly to lower the average age of its readers for advertising purposes.

The Birth List has been greatly affected by the electronic age. At one time, collecting the names of new parents was a local affair. A diaper company would pay somebody in the hospital admissions office for a carbon of maternity admissions, or somebody in a laboratory would leak the names of expectant mothers to a baby-picture studio. There are still local birth lists—and local "prenatal lists"—but there are also two companies that specialize in births nationwide. The one in New York—the National Birth Record Company—claims that it can provide information on three million four hundred thousand of the four million one hundred thousand births that take place in the country every year. Marvin Monsky, one of the company's executives, says he has computers running twenty-four hours a day to keep track of the births; an advertisement for his firm in the *Reporter of Direct Mail Advertising* is headed "We punch holes in new parents." When all the holes are punched, Monsky knows much more than the fact that a baby has been born. He knows, for instance, whether the baby was born in a private or a public hospital, and if that is not strong enough indication of the parents' income, he can feed in information available from the Census Bureau about the median income of their neighborhood. "Age, race, income, religion—this is all possible to a degree," Monsky said not long ago. He can provide lists of new parents in particular parts of the country ("We can sell an Eastern name better than a Southern name"), a list of new parents above a certain income level, and a list of new parents who are new at being new parents and presumably have not yet formed buying habits for family shopping. Monsky considers his exact source of names a

professional secret, but he acknowledges that he has to pay for every name. According to Monsky, each hospital presents a different problem in supply, and he is confident that National Birth Record can find the best supplier. "We normally spend more money securing names than our competitors," he has said. "All our people are well-quailfied sources. If you buy names from a local dealer, he may hold on to them for a while, sell them to local clients while they're fresh, and then send along old names." The danger of getting old names also precludes the use of public records. "Those names could be sixty, seventy days old," Monsky says. "If you can't get in there fast, you're not selling a birth list, you're selling a list of people with children."

As it happens, Monsky sells a list of people with children, too. He says that a detergent company suggested to National Birth Record not long ago that a list of families with two or more children would be a list of families that would buy more of everything. Monsky now collects the names and addresses of all those who have appeared more than once in the Birth List over the past several years, changes the names to "Occupant," on the theory that even if the family has moved, another family with two or more children has probably replaced it, and comes up with a list of some six million two hundred thousand households. Monsky says that for merchandsing such products as Pillsbury's Funny Face drinks for children it is the best list in the industry. He also takes pride in the Birth List. "We believe that what we do is good, on the whole," he has said. "It's good for the people who receive it—information on how to take care of children, coupons worth a lot of money, and so on. In the unfortunate case that a woman loses a baby three or four days after the birth and she writes in, we do everything we can to clean her name off the list, and we send her a letter of apology and sympathy."

Some people in the trade believe that computerization will eventually result in great master lists of all magazine readers and all gadget buyers. A man in Washington who specializes in the names of people who have contributed to conservative causes is now reportedly able to produce

the names of three hundred thousand right-wingers, sorted on tape to avoid duplication. The Diners' Club will soon be able to rent out its members sorted by profession. Dun & Bradstreet can now produce a list that selects by type of industry, number of employees at each establishment, number of employees in the entire company, geographical location, sales volume, age of business, and (if the customer subscribes to the Dun & Bradstreet credit service) net worth and Dun & Bradstreet credit rating. Comupters have had an almost revolutionary effect on the master lists that already exist—the four or five lists, sometimes called "horizontal lists," that include almost every person in the country who might ever be expected to buy anything. Firms with direct-mail programs of a certain size—mass-circulation magazines, mass-appel charities, food companies that use coupons—eventually depend on horizontal lists almost exclusively, and computerization has made it possible for them to pick their best potential customers from the mass with extraordinary sophistication. There are abut fifty-five or fifty-six million households in the United States, and a list of some forty-one million of them can be compiled either by collecting all the names that appear in phone books, as O. E. McIntyre does, or by collecting all motor-vehicle registrations, as R. L. Polk & Co. does. The Reuben H. Donnelley Corporation combines the two sources—catching some people with no telephone (or no listing) who have automobiles, and some careless city dwellers who have telephones—and builds the "Donnelley Quality Index" of some fifty million names.

McIntyre's system of maintaining its list could hardly be simpler. There are approximately five thousand telephone directories published annually in the United States, and McIntyre buys a new copy of each one of them. When a new Kansas City telephone directory appears, a clerk in McIntyre's plant in Westbury, Long Island, compares it with a stack of punch cards that were produced from the previous Kansas City telephone directory. She draws a blue line through all the names and addresses that are identical to those she has on the punch cards and through all the business listings, and throws away the punch cards containing names that do not appear in the new directory.

Another clerk makes a new punch card for every name in Kansas City that does not have a blue line through it, and then a machine re-sorts the cards from alphabetical order to street-number order for inclusion on the master tape. Some of this work is farmed out to housewives; in some parts of Long Island drawing lines through names for McIntyre forms a sort of cottage industry.

Polk has a similar system for keeping its list fresh—it folds in names as cars are registered throughout the year, then begins a new list for each state as the new year's registrations become available—but it has a more complicated problem of original supply. Polk, like National Birth Record, must make a separate arrangement with each source—and it must get all fifty states for a complete list. In some states, the company can simply buy a directory containing all the information needed. In New Jersey, Polk is given all the information free in return for looking up the names and addresses of parking violators. In New York, the law permits the Bureau of Motor Vehicles to sell rights to the information. In 1961, both Polk and Donnelley were outbid in New York by a mailing house called Circulation Associates. According to a suit filed in 1963 by Circulation Associates (and still in litigation), Polk, having been denied the registrations itself, arranged with the Commissioner of Motor Vehicles to microfilm something called the MV-50 forms, which, it turned out, contained most of the information that is found on motor-vehicle registrations—except in more legible form. The Commissioner did not deny that; he said he had decided that the MV-50 forms were public record. Circulation Associates alleged that the Commissioner had "developed a personal acquaintanceship" with some of the officials of Polk—a phrase that might be said to represent a side of the list business that has existed since the first county clerk met the first list compiler many years ago. (Polk won the bid the next time it was offered, but Donnelley also continues to advertise a complete list. The two companies regularly share the cost of transforming the registration information into usable form, share the list that results, and, in some states, do not compete against each other in trying to rent it.)

A list of eighty per cent of the families in the United States is of practically no value unless it can be refined into categories of people who have more in common than ownership of a telephone or an automobile. The greatest single aid the compilers have for making this refinement is the Census Bureau. In order to maintain consistent statistics on the population, the Census Bureau, with the advice of a local committee, permanently subdivides a metropolitan area into tracts that contain roughly a thousand relatively homogeneous families. Within each tract, census-takers gather information from one of every four families, and on the basis of that sampling the Bureau publishes statistics on the median income and education of the people living in the tract, as well as a good number of percentages and averages concerning their housing, their professions, the size of their families and their ethnic backgrounds. Tracting began with a few cities in the 1910 census, and now covers almost sixty per cent of the population, including practically everyone who lives in a city. The list compilers fold the tract information into their master tapes, so that for a financial magazine, say, their computers can immediately pick out people who live in tracts where median incomes are nine thousand dollars or more, median educations are of more than twelve years, and the percentage of "managerial and professional wage-earners" is high. McIntyre offers twenty-five variables for selecting tracts, including value of owned homes, percentage of married couples with husbands under forty-five, percentage of married couples with husbands under forty-five and children under eighteen, and percentage of owner-occupied housing units. Donnelley has about the same number of selectors programmed into its master list, including the percentage of multiple-dwelling units and the percentage of non-white housing units. As it turns out, one of the minor disadvantages of being a Negro slum dweller in the United States is being deprived of a fair share of orange-juice coupons.

Although the average merchandiser might be delighted with such extensive statistics based on such a large sampling, the resourcefulness of the big list-compiling companies only begins with census tracts. The real skill is

what is occasionally called "getting inside the tract." Since the tape of a compiler of telephone lists is arranged by address, he can easily reach only people in single-family dwellings (more children) by instructing the computer to skip over any address that has more than one name listed. The computer can also skip any telephone listed under a female name (lower income). It can select only families that have been on the list for a specified number of years (older; fewer children). The McIntyre list is carried on reels of magnetic tape that hold two hundred and forty thousand names each—the entire list of forty-one million families looks like a largish home-movie collection—and in three minutes the computer can pick out of a reel the names suitable for, say, a "TV food-snack" mailing, eliminating tracts below forty-five hundred dollars' annual income, female names, apartments, and families that have been at the same address more than eight years. For coupon offers, the McIntyre computers can replace names with "Occupant," which is less personal but more deliverable, and for magazines that prefer not to send subscription offers to their own subscribers, such as *Time* and the *Reader's Digest*, it can match its tape with the magazine's tape and eliminate the names of people who already subscribe.

If a man who earns ten thousand dollars a year happens to be hiding in a tract with a median income of eight thousand dollars, a compiler is likely to flush him out sooner or later. Polk and Donnelley know about his two cars, and they know the make, model, and age of both of them. That information is, of course, of some use to automobile manufacturers—Ford once won a prize from the Direct Mail Advertising Association for a mailing that it sent to owners of Chevrolets and Plymouths—but it can also be used by any merchandiser who wants to add to the number of people available in ten-thousand-dollar tracts by dropping to eight-thousand-dollar tracts and selling only owners of more than one car. Polk has now perfected what it calls the "Current Market Value Index," a program of checking the value, as listed in the standard used-car manual, of each car registered to a family, adding up the figures if there is more than one car, and then

assigning each of the forty-one million car-owning families in the United States a number, from zero to nine, that represents the total value of its automobiles. At the same time, Polk is converting to magnetic tape its "Household Census List," which is composed of information that the company acquires in the course of putting together the city directories it publishes in most major American cities (except the four largest). When the list is completely converted, sometime next year, Polk advertises, it will "contain more vital selection factors on a household-by-household basis than any mass list ever compiled." For the twenty-four million families that will eventually be on the "Household Census List," Polk will know—not by statistical probability but by precise information on each individual—"occupation of head of household and all persons over 18, marital status, wife's name, whether wife works, number of children, age range of children, total persons in the household, total employed persons in the household, occupancy status (owner or renter), primary families, sub-families, and secondary families, type of dwelling (single or multiple), length of residence at current address, age of structure, telephone number if there is a phone, spending index (estimated annual expenditure for current consumption)." The finished product will be what Polk calls a "precision marketing tool."

Somehow, despite the skill of the list compilers and the enterprise of the list brokers, there are names that cannot be rented. Most magazines will release the names of their active subscribers only in exchange for other active names, usually on a one-for-one basis, and will rent out only the names of "expires." A number of magazines, such as *Time*—which trades "actives" with firms like the Book-of-the-Month Club, the Columbia Record Club, and *Harper's*—will not rent out even expires, and a few magazines will release no names of subscribers, actives or expires, for rent or for trade. There are firms in almost all fields of business that rent out lists of their customers—Kayser-Roth, a wholesale clothing manufacturer, has gone as far as to rent out a list of the retail stores that carry its products—but even in businesses that involve credit cards there are some companies (notably car-rental firms) that

do not rent out their lists. According to list compilers, an up-to-date alumni list of some colleges can be obtained from the secretary of the alumni association, but the graduates of other colleges have to be collected from the alumni directory, which is, of course, out of date by the time it is printed. Many department stores do not rent out their lists, and the credit bureaus used by department stores to clear charge accounts ordinarily do not put the credit-checked names on the open market, although some of them will provide a "custom-compiled" list for, say, an oil-company credit-card mailing or a promotion mailing for a new branch of a department store. Large charities normally do not rent out their lists, although small charities often sell their lists to a broker, who combines them to create something like "Catholic Donors" or "Donors to the Cause of Peace." Aware of the fact that a large organization's roster is always obtainable, some societies and clubs try at least to make some money from the situation by having their lists marketed and policed by a list house —Polk offers two hundred and forty thousand Junior Chamber of Commerce members at twenty dollars a thousand, and fifty thousand Jaycee officers, all of whom have demonstrated intense activity, at thirty-five dollars a thousand—but other societies put dummy names on their rosters and object strenuously when they discover that the list has been used. List compilers say that they do not continue to use a roster or directory of an organization that has formally objected. In creating lists that have to be collected from a number of sources, compilers invariably miss a few names. Even a man as resourceful as Herbert Odza has no arrangements with three hundred of the twelve hundred bell captains of hotels that hold U.J.A. fund-raising banquets. And some seven hundred thousand babies manage to get born in this country every year without revealing to Marvin Monsky the name, age, race, and probable income of their parents.

"People are always asking me how to get off mailing lists," Myron Shapiro, of the Mid-Century Book Society, said recently. "I tell them there is only one way—and dying is not it." Dying will have no effect on a mail-order list until the list is cleaned and an envelope marked

"Return Requested" is actually returned; even then, the name may be picked up again from a directory or a roster by a compiler. Shapiro's advice for anyone who wants to risk being considered a bum by Harry Maginnis is to move and leave no forwarding address, not even for first-class mail. Of course, Shapiro's friend, once moved, would have to give up a few habits he had at the old place. He could not have a listed telephone, and he could not own a car, unless he wanted to take a chance on driving it without license plates. He would have to give up such conveniences as subscribing to magazines and ordering theatre tickets by mail. He would be forced to ask his university to strike his name from the alumni rolls (or, at least, he would not inform the alumni association of his sudden move), and he would resign from any club or professional society that might want to know the address of its members—even members who had no credit cards and refused to contribute to charity. He would, of course, abandon the ballot, and, to be perfectly safe, he and his wife would have to be satisfied with the number of children they already had.

"I hope he's not moving into one of six hundred and forty luxury apartment buildings in New York," Herbert Odza said not long ago, in a discussion of Shapiro's hypothetical friend.

"Why not?"

"We pay the super or someone in the management company of each building for the names of people who move in."

"He is not moving into one of those apartments."

"And he's not voting?" Odza asked.

"That has already been decided."

"And he's not writing his congressman, of course."

"His congressman!"

Odza explained patiently that people who write their congressmen often show up on lists of people who write their congressmen; they have, after all, shown themselves to be somewhat active. In fact, Odza said, one of the most successful lists in the financial field for a while was a list of people who had written to their congressmen objecting to the proposed withholding tax on bank interest and divi-

dends—an indication that they had some bank interest and dividends to be taxed.

"He will not write his congressman."

"Even if he doesn't," Odza said, "the lady in the apartment next door may be selling Christmas cards, and the Christmas-card company may ask her to suggest names of any neighbors interested in making some extra Christmas money."

To avoid being betrayed by a casual acquaintance, Shapiro's friend will have to take the final step of withdrawing competely from society—tutoring his own children, and permitting his wife to go out only for groceries, with instructions to pay in cash and speak to no one. Asking customers for names of acquaintances seems to be an increasingly popular device. "Your best prospects are your current customers," Lewis Kleid once wrote in a column that appeared in the *Reporter of Direct Mail Advertising*. "Ask them to recommend names of friends. Ask them to sell their friends. The names received from this source constitute an unusually responsive audience, and the lists which result from this effort can, in addition, be rented to produce additional revenue."

Anyone whose reaction to a particular piece of mail is an urgent desire to have his name removed from that particular mailing list has at his disposal no foolproof method short of the address-changing that Shapiro advised for getting off all lists. Some list owners will remove a name from their list upon request, but a good many find that removing one name is mechanically impossible or financially impractical. The Diners' Club can (and does) remove a member's name from the rental list if he requests it. However, unless the member has spelled his name in an unusual way on his application or has some other method of identifying the Diners' Club address plate, there is no way for him to know that if he objected to the totem pole he received, along with a fund request, from the St. Labre Indian School, or did not want to receive membership offers from the Playboy Club or the Record Club of America, he should complain to the Diners' Club. Complaining to the firm that sent the mail is a common mistake. It is likely that the unwanted piece of mail is the

result of a rented or traded list; the firm that sent it used the list on a one-time basis and would not even know the complainant's name—until he complained. There are people who indicate their desire to be removed from a particular list not by a polite letter but by filling the reply envelope with weights, or by sending back the reply card of one offer in the reply envelope of another, or by punching additional holes in reply cards that are in the form of punch cards. Like most people who have become desperate enough to resort to guerrilla tactics, they are fighting impossible odds. They often send their symbols to the wrong firm, of course, and even if they reach the right firm, the list remains unaffected, since most of the more demonstrative guerrillas—such as the one who taped a Kiplinger reply card to a box full of dead rats—prefer to remain anonymous.

Not paying for something ordered through the mail is an easier way to get free merchandise than shoplifting—after about six months and a few threatening letters, most companies charge off the loss—but it will not remove the nonpayer's name from whatever list directed the merchandise to him in the first place. There is now a credit service—the Hooper-Holmes Bureau—that collects the names of non-payers (universally known in the mail-order business as deadbeats) from subscriber firms, which can, in turn, check the deadbeat file before mailing out merchandise on credit. In only three or four years of operation, Hooper-Holmes has managed to put together a magnetic tape containing the names of more than five million certified American deadbeats. However, the tape is normally not checked until after merchandise is ordered, so being one of the Hooper-Holmes five million does not mean removal from a mailing list. To a student of the mailing-list business, of course, a deadbeat—like anyone else who demonstrates activity of any sort—is a person who has preselected himself into a category. There was an earlier deadbeat file in the trade, and using it only to check credit struck at least one broker as being about as shortsighted as using a list of magazine subscribers only to distribute magazines. "I finally figured it was a swell list of people for cash offers," Arthur Martin Karl recalled recently. "The man who

was running the association was horrified at the thought. He looked on those deadbeats as vermin, and wouldn't think of renting them out to anybody." Hooper-Holmes, a modern company, does not consider its deadbeats vermin, or even deadbeats—"We prefer to call them delinquents," the man in charge has said—but it has no plans to rent out their names.

About the most dependable strategy for someone who wants his name removed from a list is to try to clean himself off it. He can carefully read every envelope he receives by third-class mail until he comes across one that has a "Return Requested" notice on it. That one he will refuse to accept. Ordinarily, rejected third-class mail is thrown away by the post office, but rejected third-class mail with a "Return Requested" notice on it is returned to the sender, who, having list-cleaning in mind, will presumably remove the name. The man who has devoted all this energy to having his name removed from a list will have the comfort of knowing not only that he has been removed but also that he has cost the mailer eight cents—probably as much as the list owner has made from his name in four rentals.

Why anyone would ever want to go to all that trouble just to get off a list a mystery to people in the list business. The only consequence of being on a list, after all, is receiving mail, and a survey taken by the A. C. Nielsen Company for the Direct Mail Advertising Association a few years ago concluded that eighty-five per cent of the population had "no general dislike of direct mail." (The D.M.A.A. tends to see things on the bright side; the eighty-five per cent included people who "like some, not all" and people who "don't care one way or another.") Representatives of the direct-mail industry would never dispute the notion that it is rather difficult for an adult American to stay off mailing lists. They emphasize that an American is on a list from the day he is born (or, if he happens to make one of the prenatal lists, from quite a few days before he is born). If the American is Shapiro's friend, he may argue that he has some ownership rights to his name, and that they are being violated by the people who rent it out. "Names are not captives," the Lewis Kleid

advertisement says. "They can't be fenced in. They are not secret or confidential. Names are found in phone books, directories, voting lists, auto registrations, newspaper clippings, and many other places." How can there be a violation if, as Arthur Martin Karl has said, "there is no such thing as a virgin name"? It is constantly stressed that commerce in names is a normal part of American life and an important part of American business—and, to an increasing extent, it is. Bernard Fixler, of Creative Mailing Service, has said, "People who criticize direct mail don't realize what kind of country we're living in; it's *based* on advertising and selling." Although the list business itself has been almost ignored by the public, those engaged in it are reminded of public resentment against the mail it produces every time there is a reference to "junk mail"—a phrase that they find extremely unappealing as a description of the source of their livelihood. Boyce Morgan, of Kiplinger—one of the few people in the industry who speak as if any of the resentment could be created by the way lists are rented and traded—has been particularly concerned about finding a way to avoid the duplication caused by the common practice of using a number of lists for one mailing. "It is perfectly possible for a prospect to receive a dozen identical Kiplinger solicitations within a few days of each other, or even on the same day," Morgan once said in a speech before the Hundred Million Club, a Manhattan direct-mail organization that was originally composed of mailers who sent more than a hundred million pieces of mail every year. "And make no mistake: when this happens, that Kiplinger mail is pure, unadulterated 'junk' to the recipient." There is, however, a widely held theory in the field that duplication is not only harmless but probably beneficial. The *Reporter of Direct Mail Advertising* has quoted Lewis Kleid as saying, "Irrespective of the irritation factor, most mailers argue that duplicates can be a plus if mailings to similar lists are staggered to insure that recipients will not receive two or more identical pieces on the same day. . . . The recipient who ignored the first letter might be impressed by the second or third impact."

Many people in the industry believe that attacks on direct mail can often be traced to fear of economic competition on the part of the newspapers. Discussing the role of newspapers not long ago, Henry Hoke, Jr., publisher of the *Reporter of Direct Mail Advertising*, said, "I hate their guts." Hoke and other defenders of direct mail immediately answer any newspaper article that gives suggestions to the anti-direct-mail guerrillas or that dwells on the fact that the post office loses several hundred million dollars a year delivering bulk-rate third-class mail—meaning that the guerillas are paying taxes to subsidize the mail they are doing their best not to receive. The offending newspaper is likely to receive a letter from a congressman who appreciates the role of the direct-mail industry in the free-enterprise system and who will remind the editor that the post office loses less money delivering a piece of third-class mail than a piece of second-class mail—a class that includes newspapers. When Philip Weld, publisher of the Beverly, Massachusetts, *Times*, offered to send interested readers an "I Hate Junk Mail Kit"—an episode that is occasionally referred to inthe direct-mail press as "the ugly Beverly, Mass., affair"—Henry Hoke, using the tools of the trade, mailed his counterattack to every home in Beverly, every United States senator and representative, every retailer in Beverly, and six hundred editors of "retailer-oriented trade magazines." ("We're indebted to John Jacobs, of Mailways of New England, Inc., Manchester, N.H., who contributed the Beverly names from his 3½ million occupant names in New England," Hoke wrote.) The unkindest cut was that no list broker approached Weld about renting the list of the people who had sent in for the kits.

One reason the direct-mail industry reacts so quickly to public criticism is that it is particularly dependent on the good will of public institutions—Congress, the Post Office Department, the Census Bureau, the various government departments that serve as sources of lists. Even the legislature of a single state could disrupt a nationwide business, such as compiling the motor-vehicle list. The current governmental crisis in the industry is the Post Office Department ruling that after January 1, 1967, any bulk-rate

third-class mail that is not Zip Coded will go at the third-class piece rate of four cents instead of third-class bulk rate of two and seven-eighths cents. Although the large lists are already Zip Coded, some mailers are expected to decide that a number of lesser lists—particularly premium lists ("These people sent three PET DOG FOOD LABELS plus $2.00 for either a dog tag or collar embossed with the name of the pet") and lists that are rarely rented—are not worth the expense involved in adding a Zip Code number to each name, and some people believe that the volume of third-class mail will probably decrease for a while.

The more characteristic crises concern legislation. The list business always seems to be under threat of some proposed piece of restrictive legislation that is unlikely ever to become law. Pornography is usually the intended target. Congressional hearings that are of interest to the list business seem to consist mainly of testimony by the Citizens for Decent Literature or the National High School Program to Obtain Freedom from Filth. A bill introduced by Congressman Glenn Cunningham, of Nebraska, and passed by the House would make it possible for anyone who receives a piece of mail (or whose child receives a piece of mail) that he considers "obscene, lewd, lascivious, indecent, filthy, or vile" to arrange with the postmaster to have his name removed from the list responsible for directing the lewdness to his door. "The reason that I came upon this scheme was that when my boy was a Boy Scout, aged about fourteen, he took a Boy Scout magazine," Cunningham said in committee hearings. "In the magazine there were advertisements, and there was one which said, 'Start a stamp collection. Send twenty-five cents for various types of stamps.' He did this. He sent the twenty-five cents in and got his stamps—a legitimate transaction. No argument about that, and most children start stamp collections between the ages of twelve and sixteen. About two years later, he started getting this obscene type of advertising through the mail." Another bill, also aimed at pornography, would make it mandatory for list brokers to register with the government and furnish information on their transactions.

It is customary for the sponsors of such legislation to emphasize their admiration for the established direct-mail

industry and to make it clear that they are interested only in foiling the purveyors of filth. Despite these assurances, the direct-mail industry (as well as the Post Office Department and the American Civil Liberties Union) regularly testifies in opposition to bills like the one introduced by Cunningham. The president of the D.M.A.A., Robert DeLay, flanked by representatives of respectable publishing houses, arrives at the hearing carrying a copy of the D.M.A.A. Code of Conduct and a list of the distinguished corporations that have won the D.M.A.A. Gold Mailbox Award. He points out that smut peddlers do not deal with legitimate brokers but with each other, and that legislation would permit any crank to disrupt the operations of a section of the economy that is responsible for some thirty billion dollars in sales annually. On one of these occasions, DeLay said, "To kill a few cockroaches in the cellar, as it were, these bills would set fire to the entire house of American business."

The State of New York, where a good part of the list business is situated, provides at least its share of legislative threats. Two years ago, a New York assemblyman introduced a bill that would end the practice of selling the state's motor-vehicle registrations to the highest bidder. After a small outburst of editorial approval, the bill was more or less forgotten. More recently, a bill was introduced that would prohibit a bank or a brokerage house or any other firm that has a traditionally confidential relationship with its customers from renting out their names without written permission. The bill is unusual in that it actually questions the practice of renting and trading names. Discussion of direct mail—whether in legislatures or in newspapers—usually concerns only the mail itself. Newspaper stories discuss "junk mail" and "the sanctity of the mailbox," but they rarely raise questions about the ownership of names. The Direct Mail Advertising Association has not had A. C. Nielsen take a survey on what percentage of the population has "no general dislike" of the fact that someone is making money from renting out their names, or what percentage would consider this perfectly all right as long as the owner of the name received a percentage of the price. No one has proposed legislation

that would require a company to inform its customers that their names will be rented out—so that a reader who is invited to vote in the *Playboy* Jazz Poll would do so with the understanding that *Playboy* will then rent out his name, or a camera owner who sends films to be developed at the Minox processing laboratories would know that Minox is advertising that such transactions keep the addresses on its warranty list up to date and therefore more rentable. No one has suggested that the application for an American Express credit card should contain a footnote saying, "I understand that if the information I have listed above demonstrates an acceptable credit rating, American Express will use that fact as a marketing aid in renting out my name," or that the Book-of-the-Month Club coupon should be changed to read, "I have the right to cancel my membership any time after buying these three books, and I am aware of the fact that my name may be traded to *Time*, the Weekly Newsmagazine."

People in the direct-mail industry would undoubtedly argue that such disclosures would be harmful to business, and in the past such arguments have been successful. Congressman Morris Udall, of Arizona, once introduced a short-lived bill that was much more threatening than the Cunningham bill—it would have permitted a recipient to demand removal of his name from a list if he considered a piece of mail "obnoxious"—and during the hearing on the bill he asked, "Why is it, in this great country, that if some poor housewife or some poor congressman or some poor citizen does not want to be on a mailing list, or does not wish, for any reason, to receive these materials, he cannot simply get off the mailing list by making a reasonable, rational request?" The industry witnesses gave Udall some complicated explanations about the immense expense and confusion that could be caused by trying to remove one name from a list; in summary, they said it would be bad for business. A student of the list business as a concentrate of free enterprise could find the answer in one subhead of the hearing testimony, which reads, "Lists Are Precious Commodities." Udall was impressed with the industry's presentation. "By the time they got through," he recalled recently, "they were saying that

fifty thousand people would be put out of work, the economy of the whole country would be damaged, and all the universities and charities of the country would go broke. I told them that all I wanted to do was get off their damn list."

—CALVIN TRILLIN

OPINION.

June 30, 1967

GARRITY, J. The plaintiff, National Labor Relations Board ("Board"), seeks enforcement of a subpoena *duces tecum* directed to the defendant Robert W. Stoddard, as president of the Wyman-Gordon Company ("Company"), or alternatively, a mandatory injunction compelling the defendant Company to comply with the election rule promulgated by the Board on February 4, 1966 in *Excelsior Underwear, Inc.*, 156 NLRB No. 111, requiring an employer to file with the Board's Regional Director, in the Region where the union representation petition is pending, a list of the names and addresses of all employees eligible to vote in the representation election ("*Excelsior* list"). The jurisdiction of this court is asserted on the basis of §§ 9(c) and 11(2) of the National Labor Relations Act, 29 U.S.C. §§ 159(c) and 161(2), and on the basis of 28 U.S.C. § 1337.

Since May 16, 1962 the Board has conducted five elections among the defendant Company's employees to determine whether they wished to be represented by a union. None of the following unions that participated in various of the elections was able to gain a majority vote of the employees: the United Automobile Workers of America, AFL-CIO ("Autoworkers"), the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO ("Boilermakers"), and the United Steelworkers of America, AFL-CIO ("Steelworkers").

The last election was held on September 29, 1966 at the petition of the Boilermakers, and with the intervention of the Steelworkers.[1] Prior to this election, counsel for the Company notified the Board that the Company refused to consent to an election because under the Board's Consent Election agreements an employer contracts to comply with all Board rules and regulations, and the Company did not intend to comply with the *Excelsior* rule, which it contended was invalid. Both unions filed timely objections to the election based upon the Company's refusal to comply with the Regional Director's direction to submit an *Excelsior* list. In October 19, 1966 the Regional Director upheld these objections, set the election aside, and directed that another election be held.

On December 2, 1966 the Regional Director notified the Company that the election was to be held on December 29, 1966 and requested that an *Excelsior* list be filed no later than December 9, 1966. The Company again failed to file the list and, at the request of the unions, the election was postponed. On December 27, 1966 the Regional Director issued a subpoena *duces tecum* directing the defendant to provide the Board with the Company's personnel and payroll records or, in lieu thereof, with an *Excelsior* list. On December 30, 1966 the Company filed a motion to quash the subpoena, which the Board denied on January 10, 1967. Upon the defendant's continued failure and refusal to comply with the subpoena, the Board instituted this action.

The enforceability of the Board's *Excelsior* rule has been the subject of several district court decisions. The majority, including *N.L.R.B.* v. *Wolverine Industries*, E.D. Mich., 1966 F.Supp. , 64 LRRM 2060, and *N.L.R.B.* v. *Rohlen*, N.D. Ill., 1967, F.Supp. , 64 LRRM 2168, have ordered compliance with the Board subpoena. The minority view, denying enforcement of the Board subpoena, is represented by *N.L.R.B.* v. *Hanes Hosiery Division—Hanes Corp.*, M.D. N.Car., 1966, F.Supp. – , 63 LRRM 2513, and *N.L.R.B.* v. *Montgomery Ward & Co.*, M.D. Fla., 1966, F.Supp. , 64 LRRM 2061. As yet, the ques-

[1] Approximately 1700 employees voted in this election. 226 voted for the Boilermakers, 555 voted for the Steelworkers, and 903 voted against both unions.

tion has not been decided by a court of appeals, but appeals are pending from the *Hanes* and *Rohlen* decisions and perhaps from others. The major issue presented has been whether an *Excelsior* list is embraced within the term "evidence" as it is used in §§ 11(1) and 11(2) of the National Labor Relations Act, 29 U.S.C. §§ 161(1) and 161(2).

When the Board seeks enforcement of a subpoena in a district court pursuant to § 11(2), "the scope of permissible judicial inquiry in deciding whether such an aplication should be granted or denied . . . is extremely limited." *N.L.R.B.* v. *C.C.C. Associates, Inc.*, 2 Cir., 1962, 306 F.2d 534, 538. The court has jurisdiction to enforce the subpoena if the Board was acting within its statutory authority in issuing it and if the material sought is not "plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp.* v. *Perkins*, 1943, 317 U.S. 501, 509; *United States* v. *Morton Salt*, 1950, 338 U.S. 632, 642.[2]

A preliminary issue in this case is the validity of the *Excelsior* rule, which the defendants challenge on the ground that the Board in adopting it did not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. § 1001 *et seq.* The Supreme Court has said that administrative agencies, exercising their "informed discretion" may proceed by general rule or by *ad hoc* decisions. *Securities and Exchange Commission* v. *Chenery Corp.*, 1947, 332 U.S. 194, 200-203. When the Board elects to proceed by rule of decision, as it did in *Excelsior*, the publication and rulemaking provisions of §§ 3(a) and 4 of the Administrative Procedure Act, 5 U.S.C. §§ 1002(a) and 1003, do not apply. See *N.L.R.B.* v. *A.P.W. Products Co.*, 2 Cir., 1963, 316 F.2d 899, 903-906; *N.L.R.B.* v. *E. & B. Brewing Co., Inc.*, 6 Cir., 1960, 276 F.2d 594, 598, *cert. denied*, 366 U.S. 908. Nor do the adjudication provisions of §§ 5, 7 and

[2] See *Cudahy Packing Co.* v. *N.L.R.B.*, 10 Cir., 1941, 117 F.2d 692, at page 694: "When an application is filed with a District Court for an order requiring obedience to a subpoena it may inquire only to ascertain that a proceeding is pending before the Board of which it has jurisdiction and that the evidence sought relates to or touches the matter under investigation. If these facts are found to exist, it is the duty of the court to order obedience to the subpoena."

8 of the Administrative Procedure Act, 5 U.S.C. §§ 1004, 1006 and 1007, apply, since proceedings involving the "certification of employee representatives" are expressly exempted from these provisions by § 5(6). The court believes, therefore, that the Board acted within its authority in promulgating the *Excelsior* rule and that it is valid.

Was the Board acting within its authority in issuing the subpoena in the present case? It has authority to issue subpoenas under § 11(1) of the National Labor Relations Act, 29 U.S.C. § 161(1), if the "evidence whose production is required does . . . relate to any matter under investigation" and does "describe with sufficient particularity the evidence whose production is required." Clearly the information sought is described with the requisite "particularity" and the issue of union representation and the regulation of the election are "matter[s] under investigation" by the Board. National Labor Relations Act § 9(c), 29 U.S.C. § 159(c). Whether or not the *Excelsior* list is "evidence" is a closer question.

Standard definitions of "evidence", i.e., whatever tends to prove or disprove the existence of something or make clear the truth or falsehood of something, are not very helpful because the "something" at issue in this case is a group preference rather than a demonstrable fact. Also, the Board's function here is far different from that of the traditional, passive fact finder. The Board is conducting an active representation investigation in which the regulation of an election is an integral part. The ultimate issue to be resolved by the investigation is whether the Company's employees want to be represented by the Steelworkers, the Boilermakers, or no union. The Board has determined that an *Excelsior* list of the names and addresses of all employees eligible to vote in the election, to be made available to the unions to facilitate the communication of election issues, is necessary and relevant to the resolution of that ultimate issue.

Although courts which have enforced Board subpoenas of material sought in representation proceedings have not discussed specifically whether the material was evidence, they have impliedly found that it was, e.g., *N.L.R.B.* v. *Northern Trust Co.*, N.D. Ill., 1944, 56 F.Supp. 335, 336, *aff'd* 7 Cir.

1945, 148 F.2d 24; *N.L.R.B.* v. *Duval Jewelry Co., Inc.*, 5 Cir., 1958, 257 F.2d 672, 673. In *Cudahy Packing Co.* v. *N.L.R.B.*, *supra*, the court enforced a Board subpoena of a company's personnel and payroll records so that the Board could compile a list of the names of the employees eligible to vote in an election. In the instant case, the Board subpoena demands production of the same type of records to compile the same type of list, the only addition being the adresses of the employees.[3] It is difficult to see why addition of the employees' addresses should change the result. The court concludes that, in the context of § 11 of the Act, "evidence" means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation.

The question remains whether the court in its discretion should order compliance with the Board's subpoena in this case. One of the duties of the Board in administering the Act is to determine expeditiously, *Boire* v. *Greyhound Corp.*, 1963, 376 U.S. 473, 477-479, whether a particular group of employees wish to be represented by a union. Implicit in this duty is the responsibility of assuring that the employees' choice is as enlightened as possible, made with fair access to the arguments for and against each alternative. To require an employer to provide a list of the names and addresses of the employees eligible to vote seems a reasonable way of assuring the "candidates" fair access to the "electorate." This is particularly evident in a case such as this where there are over 1700 employees.

On balance, the Company has no substantial interest in refusing to provide such a list. Furnishing the list would not impose a heavy burden upon it since it already furnishes a list of the names of its employees; adding their addresses would present little difficulty. Even assuming that the defendant has standing to assert its employees' right to privacy, which is debatable, the mere disclosure of employees' addresses is not an invasion of their right

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[3] In the *Cudahy* case it is likely that the company had the alternative of simply providing a list of the names of the eligible employees, just as in this case the Company has the alternative of providing the *Excelsior* list itself.

to privacy nor can it reasonably be expected to produce such an invasion.[4]

The Company contends among other things that a list of the names and addresses of 1700 employed persons is valuable and that enforcement of the *Excelsior* rule would compel it to violate § 302(a) of the National Labor Relations Act, 29 U.S.C. § 186(a), which makes it a crime for any employer to deliver a "thing of value" to anyone seeking to represent his employees. The possible value of such a list as a mailing list gives this contention some surface plausibility. But it must be rejected as patently contrary to the intent of Congress in enacting the statute. *Zentner* v. *American Federation of Musicians*, S.D. N.Y., 1965, 237 F.Supp. 457, 463. The obvious purpose of the statute was to protect employees from harm, not from help.

Accordingly, it is ordered that the defendants comply with the plaintiff's subpoena either by producing personnel and payroll records containing the names and addresses of all employees eligible to vote in the representation election or by filing with the plaintiff a list of the names and addresses of all such employees.

W. ARTHUR GARRITY, JR.
United States District Judge

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[4] In view of the court's findings, there is no need to pass upon the Board's alternative application for a mandatory injunction "as an aid in the administration of the statute", *Walling* v. *Brooklyn Braid Co.*, 2 Cir., 1945, 152 F.2d 938, 941. The court notes, however, that the cases relied upon by the plaintiff, e.g., *United States* v. *Shafer*, 4 Cir., 1956, 229 F.2d 124, *cert. denied*, 1956, 351 U.S. 931, and *Walling* v. *Brooklyn Braid Co.*, *supra*, did not involve mandatory injunctions, and that cases in which they have been ordered in aid of federal agencies appear to be distinguishable, e.g., *Porter* v. *Lee*, 1946, 328 U.S. 247, 251.

Order.

GARRITY, D.J.

In accordance with the Opinion of the Court dated June 30, 1967, it is hereby ordered that the defendants comply with the plaintiff's subpoena either by producing personnel and payroll records containing the names and addresses of all employees eligible to vote in the representation election or by filing with the plaintiff a list of the names and addresses of all such employees.

By the Court,

RUSSELL H. PECK, Clerk
By: KATHLEEN M. SMITH
Deputy Clerk

W. ARTHUR GARRITY, JR.
United States District Judge

Date: July 17, 1967

Order Staying Execution on Motion by Defendant.

The defendant having moved for a stay of execution of or any proceedings to enforce the judgment entered in the above-entitled cause pending the disposition of the motion of said defendant for a stay of execution pending appeal it is hereby ordered, that execution of or any proceedings to enforce said judgment be and the same hereby is stayed until the disposition of said motion.

W. ARTHUR GARRITY JR.
United States District Judge

July 26, 1967

Notice of Appeal.

[Filed August 28, 1967.]

Notice is hereby given that Wyman-Gordon Company and Robert W. Stoddard as Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company, defendants above named, hereby appeal to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on July 19, 1967.

By QUENTIN O. YOUNG
Attorney for Appellants

August 28, 1967

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7000.

WYMAN-GORDON COMPANY ET AL., APPELLANTS

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[270 F. Supp. 280]

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

June 12, 1968.

ALDRICH, *Chief Judge*. This is an appeal from an order of the district court enforcing compliance with a National Labor Relations Board subpoena which ordered an employer to furnish names and addresses to its employees. The issuance of the subpoena stems from efforts of two unions, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Boilermakers), and the United Steelworkers of America, AFL-CIO (Steelworkers), to represent some 1750 production and maintenance employees at appellant's plants in three Massachusetts communities. The Board's Regional Director, after investigation and hearing, ordered an election and directed appellant, in accordance with the rule announced in *Excelsior Underwear, Inc.*, 1966, 156 N.L.R.B. 1236, to furnish the Board a list of the names and addresses of all employees eligible to vote. Appellant agreed to furnish a list of names, but refused

to supply addresses. Notwithstanding this refusal, the election was held, resulting in 226 votes for the Boilermakers, 555 for the Steelworkers, and 903 against any union.

On objection by both unions, the Regional Director set aside the election and ordered a new one. The Board affirmed this decision. Again the Regional Director demanded an *Excelsior* list, and again appellant refused. The subpoena then issued. The Board filed a complaint seeking enforcement of the subpoena or, alternatively, a mandatory injunction directing appellant to comply with the *Excelsior* requirement. The district court ordered enforcement of the subpoena, and this appeal followed. By it appellant has launched a broadside attack against the *Excelsior* rule, challenging its substance, the procedure of its promulgation, and the statutory basis of the subpoena power invoked to enforce it.

The court is of one mind in not being greatly impressed by the arguments challenging the wisdom of the *Excelsior* rule, but this is a matter on which the majority of the court does not feel called upon to make a decision. We mention briefly the Board's concern in insuring an informed employee electorate, and in balancing management's right of access to employees in the plant through the mails with a right on the part of unions—and anti-union employees—to have access to the addresses of a constantly changing roster of employees. It is unnecessary to repeat the Board's responses in *Excelsior* to the contentions that its authority to compel disclosure is limited to cases where other channels of information do not exist and that such compulsory disclosure invades the privacy of employees. Likewise we are not greatly impressed by the contention that compelling a list of names and addresses forces appellant to "interfere" with a labor organization, in violation of 29 U.S.C. § 158(a)(2), and to give a "thing of value" to a labor organization, in violation of 29 U.S.C. § 186. The former statute, as is indicated by the cases cited to us by appellant, is concerned with acts of favoritism. It is difficult to think that supplying the Board with information, pursuant to a Board order, which the Board will give to all persons alike who

show a legitimate interest, would be considered a proscribed gift.

A threshhold question, however, is raised by appellant's claim that the *Excelsior* rule is invalid because, concededly, it was promulgated in disregard of the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C.A. §§ 552, 553.[1] In the opinion of the majority of the court this issue is determinative.

Events leading to the establishment of the rule grew out of two consolidated cases coming before the Board on union challenges of elections on the ground that the employers had refused to supply the unions with lists of names and addresses of employees so that the unions might answer a campaign letter sent by the company to the employees. Recognizing the problem to be one affecting more than just the parties before it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days.[2] In so doing we consider that the Board, to put it bluntly, designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest.

In presently justifying its position the Board does not seek to carve out for itself the special defense suggested by our brother Coffin in dissent, but asserts that what it did was proper administrative action approved by the Court in *SEC* v. *Chenery Corp.*, 1947, 332 U.S. 194. It is, of course, true that the Court there recognized that an adjudicatory administrative body may promulgate rules through decision as well as through more formal

[1] We are not here concerned with the effect of failure to publish rules, themselves properly arrived at, in compliance with 5 U.S.C.A. § 552(a)(1). In this respect we agree with the views of Judge Friendly speaking for the court in *United States* v. *Aarons*, 2 Cir., 1962, 310 F.2d 341, 347-48, that such rules are valid as against one with actual notice of them. See 1 Davis, Administrative Law § 6.10 (1958).

[2] Thirty days is the period which must elapse between publication and effective date of a rule promulgated in accordance with APA procedures. 5 U.S.C.A. § 553(d).

rulemaking procedures. This is a necessary and inevitable consequence of adjudication. Normally the Board must decide cases between party and party, as the Commission did in *Chenery*. The result, if stare decisis is to mean anything, is that any principle, once decided, stands as a guide for the future and may be spoken of as a rule. Examples are legion. Sometimes, until the Board spoke, all parties may have thought the "rule" was the other way. This may be unfortunate, but it is normally unavoidable, as *Chenery* demonstrates.

In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress.

Although the first time in this circuit, this is neither the first nor the most severe instance of Board action approximating contravention of the APA in this manner. It has been long and severely critized, *e.g.*, Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 72 (1961); 1 Davis, Administrative Law § 6.13 (Supp. 1967), with no apparent effect. We regret that the matter comes before us in connection with a rule to which we see little or no objection and for which there is much to be said. Yet, to blink at this procedure in this instance because we may approve of the result, we believe would be neither honest nor wise.[3] Congress provided no exception in the APA for rules improperly promulgated, but which some court, in a case between the agency and some individual, was persuaded

[3] We are not unmindful that two circuits have supported the *Excelsior* rule. *NLRB* v. *Rohlen*, 7 Cir., 1967, 385 F.2d 52; *NLRB* v. *Hanes Corp.*, 4 Cir., 1967, 384 F.2d 188, *cert. denied* 390 U.S. 950. However, so far as appears, the Board's failure to comply with the APA was not brought to the courts' attention. The courts were concerned with whether the substance of the rule was within the Board's rule-making power, not whether it was properly adopted.

were sound. To recognize such an exception would be to emasculate the statute.

We read Judge Coffin's dissent as disagreeing on this matter only in that he believes the rule promulgated to be "procedural" within the APA definition and therefore not subject to the requirement that advance notice of the intended rulemaking, and the substance of the rule, be given and that interested parties be afforded an opportunity to comment. 5 U.S.C.A. § 553. If the rule related simply to the mechanics of conducting an election, to superintending or checking the voters, we would agree. The *Excelsior* opinion makes the suggestion that this is one of the purposes. 156 N.L.R.B., *supra*, at 1242-43. However, the Board's decision effectively contradicts its own declaration. The Board already had a valid rule requiring the employer to furnish a checklist. The additional requirement of the *Excelsior* rule is expressly stated not to apply when the time interval is "too brief . . . for the union to be able to make any meaningful use of this information." *Id* at 1242, fn. 14. We can only conclude that *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.

Such assistance is substance, not Board procedure. It differs only in degree and not in kind from a requirement, for example, that an employer having an assembly hall or a printing press should make it available to groups requesting it. The Board's contentions that furnishing a mailing list is not expensive or seriously burdensome, or is required only because the union has no effective substitute, may well be justifications for the rule, but they do not change its character. Judge Coffin's emphasis on the relative lack of burden, and comparing the compilation of the list with affording space on a bulletin board, suggests factual determinations in each case that seem to us unnecessary at best. His desire to resolve questions of doubt in favor of a procedural label loses importance to us when one considers that its only purpose is to avoid affording interested parties an opportunity to present their views as to what is, quite apparently, a controversial rule.

It is also true that compliance with the rule may well increase the fairness of the election. This, however, is a conclusory argument. Many actions by the employer may add to the fairness of the election. This does not mean that ordering them to be done is procedural. We are particularly unmoved by our brother Coffin's suggestion that the fact the rule sets up a positive as distinguished from a negative requirement is indicative that it is not substantive.

The judgment of the district court is set aside and the court is ordered to dismiss the complaint.

COFFIN, *Circuit Judge* (dissenting). For the purpose of deciding the applicability of the notice provision of the Administrative Procedure Act, 5 U.S.C.A. § 1003(a), I view the *Excelsior* rule as procedural and thus valid despite absence of advance notice. I recognize that this is a ground not relied on by the Board, which seemed to assert a standard defense to a standard assault. But the same shoe fits both parties, for the distinction which divides this court was obviously far from the concern of appellant, which said in its brief, ". . . it is clear the Board recognized that it was establishing a new rule or procedure in the conduct of election proceedings under Section 9 of the Act."

The legislative history suggests to me that in grey areas doubt about the nature of a rule should be resolved in favor of applying the procedural label. In the first place, the few attempts to define terms equate substantive rules with "rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards", Attorney General's Manual on the A.P.A. (1947) 13 n. 5, or with rules "other than organizational or procedural . . . which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to . . . 15 U.S.C. 78n." Manual, *supra* at 30. I read the language and these examples as giving restrictive rather than expansive meanings to "substantive rule".

In addition, the Senate Committee on the Judiciary made clear that in exempting procedural rules from the notice requirement it was seeking to encourage such rules because "those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned." Legis. Hist. of the A.P.A. (1946), 18, 313.

The *Excelsior* rule itself seems to me to be clearly on the procedural side. It sets up a positive requirement of furnishing addresses as well as names of employees, to be applicable in every election. In this respect it differs from the proscription of selectively directed acts of coercion which are more appropriately accomplished through the unfair labor practice procedures.

That the requirement looks toward action the effect of which reaches beyond relations between a party and the Board ought not to be a controlling consideration, any more than it is with reference to the requirement in 29 C.F.R. § 101.19 (the Board's "Statements of Procedure" governing elections) that elections "be adequately publicized by the posting of official notices in the establishment. . . ." Indeed, the natural home of the *Excelsior* rule would seem to be in § 101.19.[1]

It is also, I think, a factor of relevance to the substance vs. procedure issue that the burden on the employer's time, efforts, or property in being compelled to furnish addresses of employees is inconsequential. I do not share the court's conclusion that this requirement "differs only in degree and not in kind" from one that would force an employer to make an assembly hall available on request. I would say that we are dealing with a dichotomy where difference in degree can result in a difference of kind or

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[1] All of this only refers to the primary objective of *Excelsior* to achieve better elections. The fact that a secondary purpose, the expeditious handling of challenges of voter eligibility, is unquestionably procedural is an added factor of some significance. While a procedural secondary rule could not save a rule otherwise clearly substantive, it would seem that a primary purpose of ambiguous effect might be aided, insofar as notice is concerned, by such a secondary purpose.

difference in categorization. This, I think, is illustrated by the above noted procedural requirement that notices of election be posted "in the establishment"—in itself a minimal encroachment on the employer's domain.

While it may be that forcing employers to share with unions their previous monopoly on knowledge of addresses may have a net result of strengthening union power generally, such a result cannot be said to alter substantive "rights" unless the employer's prior easy access to addresses rises to the dignity of a right. *Cf. Sibbach* v. *Wilson*, 312 U.S. 1, 14 (1941). Moreover, the *Excelsior* rule by its terms applies to "all parties"—which include employees hostile to a new union or seeking decertification of an old one. *Cf. Wallace Murray Co.*, 1968-1 CCH NLRB Dec. ¶ 22,256.

I would, for the above reasons, hold that the *Excelsior* rule was valid. But this would not have been an end to the case. There remains the difficult question—how, if at all, can *Excelsior* be properly enforced?[2] The district court ordered that the subpoena be honored. The Board's power lies in the statutory language granting "the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. . . ." 29 U.S.C.A. § 161(1).

The authorities which have upheld the subpoena power as available to procure an *Excelsior* list[3] have defined the proceedings leading to representation certification as an investigation and have tortured the concept of "evidence" into something which is helpful in "facilitating a fully informed electorate". *NLRB* v. *Rohlen*, *supra* at 57. A

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[2] While what follows goes beyond the issue which divides the court, the writer feels obliged to explore the problem of enforcement which has led to conflicting and often strained statutory interpretation.

[3] *NLRB* v. *Rohlen*, 385 F.2d 52 (7th Cir. 1967); *N.L.R.B.* v. *Hanes Corp.*, 384 F.2d 188 (4th Cir. 1968), *cert. denied* March 4, 1968; *NLRB* v. *British Auto Parts*, 266 F. Supp. 368 (C.D. Cal. 1967); *Swift* v. *Solien*, 56 CCH Lab. Cas. ¶ 12140 (E.D. Mo. 1967); *NLRB* v. *Teledyne, Inc.*, 56 CCH Lab. Cas. ¶ 12229 (N.D. Cal. 1967); *NLRB* v. *Beech-Nut, Inc.*, 56 CCH Lab. Cas. ¶ 12237 (S.D. N.Y. 1967).

scrutiny of 29 U.S.C.A. § 161 yields the impression that "evidence" is used throughout in its more traditional sense as data relevant to the proof of a fact in issue.[4] I am sympathetic with the courts which have not been willing to make this leap. *NLRB* v. *Q-T Shoe Co.*, Civil No. 140-67 (D. N.J., filed Jan. 19, 1968); *NLRB* v. *Montgomery Ward, Inc.*, 54 CCH Lab. Cas. ¶ 11659 (M.D. Fla. 1967).

A second solution, suggested by *Q-T Shoe Co., supra*, is that the only way to enforce the *Excelsior* rule is first to secure a determination that refusal by an employer to provide a list of names and addresses of employees constitutes an unfair labor practice under 29 U.S.C.A. § 158 (a) (1), and then to seek the aid of the court under 29 U.S.C.A. § 160(e). This would seem plausible until the statutory definitions of unfair labor practices are examined. The Board in *Excelsior* wisely refrained from saying whether refusal to disclose names and addresses of employees would constitute "interference, restraint, or coercion" within the meaning of 29 U.S.C.A. § 158(a) (1). I would say that it is at least doubtful that any one of the effective verbs would cover such a case. "Interfere" is the most adaptable, but its entire thrust is aggressive, not passive. According to Webster's International Dictionary (3d int. ed. 1961), it means such things as "intervene", "intermeddle", and "interpose".

It cannot be said with assurance that a refusal to respond to the *Excelsior* rule—unless, perhaps, a repeated refusal—would predictably be denominated an unfair

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[4] A similar approach would be to define more narrowly the particular "investigation" as the quest for the names and addresses of the employees. With this frame of reference, the list of such names and addresses could be considered more traditionally as "evidence" relevant to the proof of the object of the investigation. Indeed the subpoena served on appellant contemplated a hearing before the Regional Director at which appellant's president was to testify from corporate books and records concerning the names and addresses of employees. In lieu of such books, a list would be received but only after Board agents had "verified its contents by examination of the subpoenaed books and records". In short, the list is arguably evidence tending to establish the true names and addresses being sought. The difficulty with this approach is that it tortures the word "investigation" into something quite different from its use in 29 U.S.C.A. § 159.

labor practice.[5] Moreover, constant litigation would ensue over the issue whether, in a given case, the refusal to provide a list had any effect at all on the representation proceeding. For example, in the case at bar appellant moved to quash the subpoena, citing as one ground that the unions already had employee mailing lists.

This leads to the remaining mode of enforcing the rule, if indeed there is any way at all. This is the injunction. The Congress has indicated by statute that the Board has authority to prescribe "regulations and rules of decision" governing consent elections. 29 U.S.C.A. § 159(c)(4). The Supreme Court has made it clear that "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly . . . [are] matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

While there is a step between statute and rule, not present in *United States* v. *Feaster*, 330 F.2d 671 (5th Cir. 1964), I see no difference in principle. If, in *Feaster*, the statutory right to have access to books and records supported an injunction compelling access to names, addresses, and job classifications of employees, so here a rule predicated on statutory authority to regulate elections and carrying out Congressional policy should support the same remedy. Or, to go back to the observation in *Walling* v. *Brooklyn Braid Co.*, 152 F.2d 938, 941 (2d Cir. 1945), we should "consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted."

Assuming, therefore, the validity of the *Excelsior* rule, I see no other certain way in which it can be enforced than by injunction. And while the absence of other remedy is no adequate justification for judicial invention, I feel that enforcement of the rule lies well within the equity powers of the district court. I would therefore remand the case for consideration of the Board's alternative prayer for an injunction.

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[5] I would add that I would prefer some lesser sanction for enforcement of procedural rules than that stemming from an unfair labor practice proceeding.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7000

WYMAN-GORDON COMPANY ET AL., DEFENDANTS, APPELLANTS

v.

NATIONAL LABOR RELATIONS BOARD, PLAINTIFF, APPELLEE

JUDGMENT

June 12, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is set aside and the case is remanded with directions to dismiss the complaint.

By the Court:

(s) ROGER A. STINCHFIELD,
Clerk.

SUPREME COURT OF THE UNITED STATES

No. 463, October Term, 1968

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WYMAN-GORDON COMPANY

ORDER ALLOWING CERTIORARI.—Filed November 12, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WYMAN-GORDON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–12a) is not yet officially reported. The opinion of the district court (R. 118–124) [1] is reported at 270 F. Supp. 280. The decision of the Board's Regional Director, out of which the instant case arises (R. 11–13), is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1968 (App. B, p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the record appendix, a copy of which has been filed along with the petition.

QUESTIONS PRESENTED

1. Whether the requirement that employers must furnish the National Labor Relations Board with the names and addresses of the employees eligible to vote in a representation election—information which the Board makes available to the contestants in the election—is invalid because the agency promulgated it in an adjudicatory proceeding rather than under the rule-making procedures of the Administrative Procedure Act.

2. If the first question is answered negatively, whether, where an employer refuses to furnish such information, the Board may compel its production through a proceeding in a federal district court.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix D, *infra*, pp. 34a–39a.

STATEMENT

In *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966),[2] the Board decided that, in future representation election cases, an employer would be required to file with the Board's Regional Director, prior to the conducting of the election, a list of the names and addresses of the employees eligible to vote therein, and that the Regional Director would then make the list available to all contestants in the election.[3] The

[2] The Board's opinion in *Excelsior* is set forth at R. 14–32, and, for the Court's convenience, in Appendix C, *infra*, pp. 14a–33a.

[3] Before reaching its decision in *Excelsior*, the Board obtained the views of leading employer and union groups, which filed briefs and presented oral argument, as *amici curiae* (R. 17–18; App. C, pp. 17a–18a.

instant case grows out of respondent Company's refusal to comply with the *Excelsior* requirement.

On July 13, 1966, the International Brotherhood of Boilermakers filed a petition, pursuant to Section 9(c)(1) of the Act, seeking to represent the Company's employees at its plants in Worcester, North Grafton, and Millbury, Massachusetts (R. 9). The United Steelworkers of America intervened in the proceeding (R. 11). After investigation and hearing, the Board's Regional Director directed that an election be held in a unit consisting of the approximately 1750 production and maintenance employees at the three plants (R. 12–13). The Regional Director further directed the Company to furnish, prior to the election, a list of the names and addresses of the eligible voters, as required by the Board's *Excelsior* decision (R. 13, n. 3).

The Company notified the Regional Director that it would not furnish the list; the election was held without it, and the unions lost; they filed objections to the election based on the Company's refusal to furnish the list (R. 33–36). The Regional Director upheld the unions' objections, set aside the first election, and directed that another election be held; the Board sustained this action (R. 37–38, 39). The Regional Director again directed the Company to furnish the list (R. 40–41).

When the Company again refused, the Regional Director, pursuant to Section 11(1) of the Act, issued a subpoena *duces tecum* requiring the Company to produce its books and records showing the names and addresses of the employees eligible to vote in the elec-

tion, or, in lieu thereof, a list containing that information (R. 42–43). The Company moved to quash the subpoena; the Board denied the motion (R. 44–46, 47). When the Company still refused to comply with the subpoena, the Board brought an action in the United States District Court for the District of Massachusetts to enforce the subpoena, or, alternatively, for a mandatory injunction directing the Company to comply with the *Excelsior* requirement (R. 2–7).

The district court found that the *Excelsior* requirement was a valid exercise of the Board's statutory authority and was properly promulgated in an adjudicatory rather than a rule-making proceeding, and enforced the subpoena (R. 118–124). The court of appeals (with one judge dissenting) reversed. Although the court characterized the *Excelsior* requirement as one "to which we see little or no objection and for which there is much to be said" (App. A, p. 5a), it held the requirement invalid because it was not promulgated in accordance with the requirements prescribed for rulemaking proceedings in Section 4 of the Administrative Procedure Act (5 U.S.C. 553).

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals that the Board could adopt its *Excelsior* requirement only by following the formal rule-making procedures of the Administrative Procedure Act conflicts with this Court's decision in *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, and other cases defining the authority of administrative agencies to promulgate new principles in adjudicatory

proceedings; and rests upon a basic misinterpretation of the requirements of that Act.

a. In *Chenery*, this Court upheld a new rule which the Securities and Exchange Commission had promulgated in an adjudicatory proceeding under the Public Utilities Holding Company Act of 1935. The rule in effect barred management from trading in the securities of a company during its reorganization by limiting the participation of such securities under the reorganization plan to the amount the management had paid for them. The Court rejected the contention that the Commission was precluded from thus announcing and applying a new principle in an adjudicatory proceeding and could only "promulgate a general rule outlawing such profits in future utility reorganizations" (332 U.S. at 199–200). It pointed out (*id.* at 202) that "any rigid requirement" that the agency must perform "[t]he function of filling in the interstices of the Act * * * through this quasi-legislative promulgation of rules to be applied in the future * * * would make the administrative procedures inflexible and incapable of dealing with many of the specialized problems which arise"; that since "the agency must retain power to deal with the problems on a case-by-case basis if the administrative procedure is to be effective, [t]here is thus a very definite place for the case-by-case evolution of statutory standards" (*id.* at 203); and it concluded that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency" (*ibid.*).

See, also, *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 371; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 421.

The Board did not abuse its "informed discretion" in promulgating the *Excelsior* requirement in an adjudicatory rather than a formal rule-making proceeding. There was no unfairness in announcing the new principle in that decision. The Board gave interested labor and management groups the opportunity to participate in the proceeding as *amici curiae*, and some of them did submit their views; and the agency fully explained its reasons for adopting the principle and rejecting the objections thereto.

Indeed, the propriety of the Board's promulgation of the *Excelsior* requirement in an adjudicatory proceeding is *a fortiori* in light of *Chenery*. For in that case the probable effect of the Commission's ruling was "retroactively [to] prevent [the] management from securing the profits and control which were the objects of the preferred stock purchases" (332 U.S. at 203), even though the management was not on notice when it made the purchases that they were illegal. In the present situation, on the other hand, the *Excelsior* requirement was made prospective in operation, in order "to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated" (App. C, p. 20a, n. 5; R. 20, n. 5); and it had been in effect for seven months when, in this case, the Regional Director initially directed the Company to furnish the information (R. 3) and for more than fifteen months when the district court so ordered (R. 124–125). Thus, contrary

to the view of the court of appeals (App. A, pp. 4a–5a), the fact that the Board, unlike the Commission in *Chenery*, did not apply its newly announced rule to the parties to that case makes this an even stronger case than *Chenery* for upholding the agency's right to announce such a principle in an adjudicatory proceeding. Administrative agencies, no less than courts,[4] have the authority to apply prospectively new principles announced in adjudicatory decisions. See *National Labor Relations Board* v. *A.P.W. Products Co.*, *supra*, 316 F. 2d 899, 905–906 (C.A. 2); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237, 239–241 (C.A.D.C.); *City of Chicago* v. *Federal Power Commission*, 385 F. 2d 629, 642–643 (C.A.D.C.); *Safarik* v. *Udall*, 304 F. 2d 944, 949–950 (C.A.D.C.), and authorities cited in nn. 3 and 4.

Other courts of appeals consistently have recognized the Board's broad discretion to establish new policies and principles through decision in particular cases rather than by rulemaking. For example, in *National Labor Relations Board* v. *A.P.W. Products Co.*, *supra*, the Second Circuit sustained the Board's action in enunciating, in an adjudicatory proceeding, a reversal of its prior practice of tolling back pay for the period between the trial examiner's proposed dismissal of an unfair labor practice charge and the Board's decision to the contrary. The court pointed out (316 F. 2d at 905):

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[4] See, *e.g.*, *Linkletter* v. *Walker*, 381 U.S. 618, 622–629; *James* v. *United States*, 366 U.S. 213, 221–222; *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364.

> * * * [M]uch can be and has been said in favor of an agency's invoking the rule-making procedure when it wants to make rules. * * * But our question is not of wisdom but of authority. Congress cannot have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to "rules," which may apply for the past, for the future, or, more generally, for both. * * * The short of it would seem to be that when an administrative agency makes law as a legislature would, it must follow the rule-making procedure prescribed in § 4 [5 U.S.C. 553], and when it makes law as a court would, it must follow the adjudicative procedure prescribed in §§ 5, 7 and 8 [5 U.S.C. 554, 556, 557]; whether to use one method of law making or the other is a question of judgment, not of power. * * *

To like effect, see *National Labor Relations Board* v. *Penn Cork & Closures, Inc.*, 376 F. 2d 52, 57 (C.A. 2), certiorari denied *sub nom. District Lodge No. 15, etc.* v. *National Labor Relations Board*, 389 U.S. 843; *National Labor Relations Board* v. *E & B Brewing Co.*, 276 F. 2d 594, 598 (C.A. 6), certiorari denied, 366 U.S. 908; *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167, 174 (C.A. 4), certiorari denied, 361 U.S. 943; *Optical Workers' Union Local 24859* v. *National Labor Relations Board*, 227 F. 2d 687, 691 (C.A. 5), certiorari denied, 351 U.S. 963. See also Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 926–927 (1965).

In *Howell Refining Co.* v. *National Labor Relations Board*, C.A. 5, No. 24802, decided August 12, 1968,

the Fifth Circuit recently stated its disagreement with the present case.[5] In upholding the *Excelsior* rule as "a valid exercise of the Board's power to ensure employees a fair and free choice in the selection of their representative" (App. E, p. 45a), the court noted in a footnote that although the employer had not raised the point, the First Circuit had invalidated the *Excelsior* rule "because of the manner of its adoption," but that it took "a different view of the matter and decline[d] to follow the *Wyman-Gordon* case" (App. E, p. 45a, n. 8).

b. The significance of the court of appeals' error is increased by the fact that three other courts of appeals have upheld the Board's *Excelsior* requirement on the merits. *Howell Refining Co.* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Hanes Hosiery Division,* 384 F. 2d 188 (C.A. 4), certiorari denied, 390 U.S. 950; *National Labor Relations Board* v. *Rohlen,* 385 F. 2d 52 (C.A. 7). As noted, the Fifth Circuit in *Howell* expressly disapproved the present case; the two other courts, however, apparently did not consider whether the Board's adoption of the *Excelsior* principle in an adjudicatory proceeding affected its validity. Thus, the effect of the decision below is that the *Excelsior* requirement is applicable to representation elections conducted in the Fourth, Fifth and Seventh Circuits but not to those conducted in the First Circuit. The Board conducts a large number of representation elections[6]

[5] Pertinent excerpts from the *Howell* opinion are reprinted in Appendix E, *infra*, pp. 40a–45a.

[6] During the fiscal year ended June 30, 1967, the Board conducted more than 8,000 representation elections. *Thirty-second Annual Report of the NLRB*, p. 234 (G.P.O. 1968).

and the governing rules therefor should be uniform throughout the country. The decision below has created uncertainty in this important area of labor law, and prompt resolution of the issue by this Court is desirable.[7]

c. The court of appeals further erred in its assumption that the Administrative Procedure Act requires that all administrative proceedings involving the prescription of rules of general applicability must be conducted in accordance with the procedures that Act specifies for formal rulemaking. Although the Act prescribes different procedures for rulemaking and adjudication,[8] it does not state when one rather

[7] The validity of the *Excelsior* requirement is at issue in cases presently pending before the courts of appeals of three other circuits. *Beech-Nut Life Savers, Inc.* v. *National Labor Relations Board*, No. 32,002, C.A. 2, on appeal from 274 F. Supp. 432 (S.D.N.Y.); *British Auto Parts* v. *National Labor Relations Board*, No. 21,883, C.A. 9, on appeal from 266 F. Supp. 368 (C.D. Cal.). *Teledyne, Inc.* v. *National Labor Relations Board*, No. 22,354, C.A. 9, on appeal from 66 LRRM 2408 (N.D. Cal.); *National Labor Relations Board* v. *Q-T Shoe Mfg. Co.*, No. 17,203, C.A. 3, on appeal from 67 LRRM 2356 (D. N.J.). There is no occasion, however, for this Court to await the outcome of those cases. The considerations bearing on the validity of the *Excelsior* requirement and the propriety of its adoption in an adjudicatory proceeding have been fully considered in the cases already decided. Moreover, whatever conclusions the other courts reach would not eliminate the existing inconsistency in result among the four circuits that have passed on the *Excelsior* requirement.

[8] The Act specifies the following steps for the promulgation of a formal rule: (1) general notice of the proposed rulemaking must be published in the Federal Register, unless persons subject thereto have actual notice thereof; (2) interested persons must be given an opportunity to submit their views on the proposed rule; and (3) after consideration of the relevant

than the other procedure is to be followed. The rule-making procedure thus need be utilized only when the agency elects to act by promulgating a formal rule.[9] Here, of course, the Board did not elect so to proceed, and the Act's requirements for formal rulemaking accordingly were inapplicable.

2. If the Court agrees that the *Excelsior* requirement was validly promulgated, a further question is presented: whether the Board may properly enforce that requirement by a suit in a federal district court. Although the court of appeals did not reach that issue, we believe it would be appropriate for this Court to decide it, in order to put an end to the increasing volume of litigation that has developed over the *Excelsior* principle. Rather than argue this point now, we simply note that the Fourth Circuit in *Hanes* held that the Board had power to enforce the *Excelsior* requirement either through a subpoena enforcement proceeding under Section 11(2) of the National Labor Relations Act, or by a suit in a district court

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matter presented, the agency must incorporate in the rules "a concise general statement of their basis and purpose" and publish them in the Federal Register at least 30 days before their effective date (5 U.S.C. 552, 553). The procedure for "adjudication" provides for the typical adversary proceeding—notice of the issues, responsive pleading, an opportunity to submit evidence before a hearing officer, and decision (5 U.S.C. 554, 556, 557).

[9] The Act expressly makes the rule-making procedure inapplicable to the adoption of merely procedural rules. See 5 U.S.C. 552(a)(1)(D), 553(b)(3)(A). For the reasons set forth by Judge Coffin in his dissenting opinion (App. A, pp. 7a–12a), it is our view that the *Excelsior* requirement is exempt from the formal rule-making requirements of the Act because it is a "procedural," rather than a "substantive," rule.

for a mandatory injunction under 28 U.S.C. 1337; and that the Seventh Circuit in *Rohlen*, without passing on the latter alternative, agreed that a proceeding under Section 11(2) would lie.[10] We believe that either procedure may be used.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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National Labor Relations Board.
AUGUST 1968.

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[10] Judge Coffin, in his dissent in the present case, stated that the *Excelsior* requirement was enforceable by injunctive suit (App. A, pp. 11a–12a).

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APPENDIX A

United States Court of Appeals For the First Circuit

No. 7000

WYMAN-GORDON COMPANY ET AL., APPELLANTS

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

Appeal from the United States District Court for the District of Massachusetts

[270 F. Supp. 280]

Before ALDRICH, *Chief Judge,* MCENTEE and COFFIN, *Circuit Judges.*

June 12, 1968

ALDRICH, *Chief Judge.* This is an appeal from an order of the district court enforcing compliance with a National Labor Relations Board subpoena which ordered an employer to furnish names and addresses to its employees. The issuance of the subpoena stems from efforts of two unions, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Boilermakers), and the United Steelworkers of America, AFL-CIO (Steelworkers), to represent some 1750 production and maintenance employees at appellant's plants in three Massachusetts communities. The

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Board's Regional Director, after investigation and hearing, ordered an election and directed appellant, in accordance with the rule announced in *Excelsior Underwear, Inc.*, 1966, 156 N.L.R.B. 1236, to furnish the Board a list of the names and addresses of all employees eligible to vote. Appellant agreed to furnish a list of names, but refused to supply addresses. Notwithstanding this refusal, the election was held, resulting in 226 votes for the Boilermakers, 555 for the Steelworkers, and 903 against any union.

On objection by both unions, the regional Director set aside the election and ordered a new one. The Board affirmed this decision. Again the Regional Director demanded an *Excelsior* list, and again appellant refused. The subpoena then issued. The Board filed a complaint seeking enforcement of the subpoena or, alternatively, a mandatory injunction directing appellant to comply with the *Excelsior* requirement. The district court ordered enforcement of the subpoena, and this appeal followed. By it appellant has launched a broadside attack against the *Excelsior* rule, challenging its substance, the procedure of its promulgation, and the statutory basis of the supoena power invoked to enforce it.

The court is of one mind in not being greatly impressed by the arguments challenging the wisdom of the *Excelsior* rule, but this is a matter on which the majority of the court does not feel called upon to make a decision. We mention briefly the Board's concern in insuring an informed employee electorate, and in balancing management's right of access to employees in the plant through the mails with a right on the part of unions—and antiunion employees—to have access to the addresses of a constantly changing roster of employees. It is unnecessary to repeat the Board's responses in *Excelsior* to the contentions that

its authority to compel diclosure is limited to cases where other channels of information do not exist and that such compulsory disclosure invades the privacy of employees. Likewise we are not greatly impressed by the contention that compelling a list of names and addresses forces appellant to "interfere" with a labor organization, in violation of 29 U.S.C. § 158(a)(2), and to give a "thing of value" to a labor organization, in violation of 29 U.S.C. § 186. The former statute, as is indicated by the cases cited to us by appellant, is concerned with acts of favoritism. It is difficult to think that supplying the Board with information, pursuant to a Board order, which the Board will give to all persons alike who show a legitimate interest, would be considered a proscribed gift.

A threshhold question, however, is raised by appellant's claim that the *Excelsior* rule is invalid because concededly, it was promulgated in disregard of the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C. §§ 552, 553.[1] In the opinion of the majority of the court this issue is determinative.

Events leading to the establishment of the rule grew out of two consolidated cases coming before the Board on union challenges of elections on the ground that the employers had refused to supply the union with lists of names and addresses of employees so that the unions might answer a campaign letter sent by the company to the employees. Recognizing the problem to be one affecting more than just the parties before

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[1] We are not here concerned with the effect of failure to publish rules, themselves properly arrived at, in compliance with 5 U.S.C.A. § 552(a)(1). In this respect we agree with the views of Judge Friendly speaking for the court in *United States* v. *Aarons*, 2 Cir., 1962, 310 F. 2d 341, 347–48, that such rules are valid as against one with actual notice of them. See 1 Davis, Administrative Law § 6.10 (1958).

it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days.[1] In so doing we consider that the Board, to put it bluntly, designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest.

In presently justifying its position the Board does not seek to carve out for itself the special defense suggested by our brother Coffin in dissent, but asserts that what it did was proper administrative action approved by the Court in *SEC* v. *Chenery Corp.*, 1947, 332 U.S. 194. It is, of course, true that the Court there recognized that an adjudicatory administrative body may promulgate rules through decision as well as through more formal rule-making procedures. This is a necessary and inevitable consequence of adjudication. Normally the Board must decide cases between party and party, as the Commission did in *Chenery*. The result, if stare decisis is to mean anything, is that any principle, once decided, stands as a guide for the future and may be spoken of as a rule. Examples are legion. Sometimes, until the Board spoke, all parties may have thought the "rule" was the other way. This may be unfortunate, but it is normally unavoidable, as *Chenery* demonstrates.

In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion, suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely

[1] Thirty days is the period which must elapse between publication and effective date of a rule promulgated in accordance with APA procedures. 5 U.S.C.A. § 553(d).

where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress.

Although the first time in this circuit, this is neither the first nor the most severe instance of Board action approximating contravention of the APA in this manner. It has been long and severely criticized, *e.g.*, Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961); 1 Davis, Administrative Law § 6.13 (Supp. 1967), with no apparent effect. We regret that the matter comes before us in connection with a rule to which we see little or no objection and for which there is much to be said. Yet, to blink at this procedure in this instance because we may approve of the result, we believe would be neither honest nor wise.[3] Congress provided no exception in the APA for rules improperly promulgated, but which some court, in a case between the agency and some individual, was persuaded were sound. To recognize such an exception would be to emasculate the statute.

We read Judge Coffin's dissent as disagreeing on this matter only in that he believes the rule promulgated to be "procedural" within the APA definition and therefore not subject to the requirement that advance notice of the intended rulemaking, and the substance of the rule, be given and that interested parties be afforded an opportunity to comment. 5 U.S.C.A. § 553. If the rule related simply to the me-

[3] We are not unmindful that two circuits have supported the *Excelsior* rule. *NLRB* v. *Rohlen*, 7 Cir., 1967, 385 F. 2d 52; *NLRB* v. *Hanes Corp.*, 4 Cir., 1967, 384 F. 2d 188, *cert. denied* 390 U.S. 950. However, so far as appears, the Board's failure to comply with the APA was not brought to the court's attention. The courts were concerned with whether the substance of the rule was within the Board's rule-making power, not whether it was properly adopted.

chanics of conducting an election, to superintending or checking the voters, we would agree. The *Excelsior* opinion makes the suggestion that this is one of the purposes. 156 N.L.R.B., *supra,* at 1242–43. However, the Board's decision effectively contradicts its own declaration. The Board already had a valid rule requiring the employer to furnish a checklist. The additional requirement of the *Excelsior* rule is expressly stated not to apply when the time interval is "too brief . . . for the union to be able to make any meaningful use of this information." *Id* at 1242, fn. 14. We can only conclude that *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.

Such assistance is substance, not Board procedure. It differs only in degree and not in kind from a requirement, for example, that an employer having an assembly hall or a printing press should make it available to groups requesting it. The Board's contentions that furnishing a mailing list is not expensive or seriously burdensome, or is required only because the union has no effective substitute, may well be justifications for the rule, but they do not change its character. Judge Coffin's emphasis on the relative lack of burden, and comparing the compilation of the list with affording space on a bulletin board, suggests factual determinations in each case that seem to us unnecessary at best. His desire to resolve questions of doubt in favor of a procedural label loses importance to us when one considers that its only purpose is to avoid affording interested parties an opportunity to present their views as to what is, quite apparently, a controversial rule.

It is also true that compliance with the rule may well increase the fairness of the election. This, how-

ever, is a conclusory argument. Many actions by the employer may add to the fairness of the election. This does not mean that ordering them to be done is procedural. We are particularly unmoved by our brother Coffin's suggestion that the fact the rule sets up a positive as distinguished from a negative requirement is indicative that it is not substantive.

THE JUDGMENT OF THE DISTRICT COURT IS SET ASIDE AND THE COURT IS ORDERED TO DISMISS THE COMPLAINT

COFFIN, *Circuit Judge* (dissenting): For the purpose of deciding the applicability of the notice provision of the Administrative Procedure Act, 5 U.S.C.A. § 1003(a), I view the *Excelsior* rule as procedural and thus valid despite absence of advance notice. I recognize that this is a ground not relied on by the Board, which seemed to assert a standard defense to a standard assault. But the same shoe fits both parties, for the distinction which divides this court was obviously far from the concern of appellant, which said in its brief, ". . . it is clear the Board recognized that it was establishing a new rule or procedure in the conduct of election proceedings under Section 9 of the Act."

The legislative history suggests to me that in grey areas doubt about the nature of a rule should be resolved in favor of applying the procedural label. In the first place, the few attempts to define terms equate substantive rules with "rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards", Attorney General's Manual on the A.P.A. (1947) 13 n. 5, or with rules "other than organizational or procedural . . . which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to . . . 15 U.S.C. 78n." Man-

ual, *supra* at 30. I read the language and these examples as giving restrictive rather than expansive meanings to "substantive rule".

In addition, the Senate Committee on the Judiciary made clear that in exempting procedural rules from the notice requirement it was seeking to encourage such rules because "those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned." Legis. Hist. of the A.P.A. (1946), 18, 313.

The *Excelsior* rule itself seems to me to be clearly on the procedural side. It sets up a positive requirement of furnishing addresses as well as names of employees, to be applicable in every election. In this respect it differs from the proscription of selectively directed acts of coercion which are more appropriately accomplished through the unfair labor practice procedures.

That the requirement looks toward action the effect of which reaches beyond relations between a party and the Board ought not to be a controlling consideration, any more than it is with reference to the requirement in 29 C.F.R. § 101.19 (the Board's "Statements of Procedure" governing elections) that elections "be adequately publicized by the posting of official notices in the establishment. . . ." Indeed, the natural home of the *Excelsior* rule would seem to be in § 101.19.[4]

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[4] All of this only refers to the primary objective of *Excelsior*, to achieve better elections. The fact that a secondary purpose, the expeditious handling of challenges of voter eligibility, is uncontrovertedly procedural is an added factor of some significance. While a procedural secondary rule could not save a rule otherwise clearly substantive, it would seem that a primary purpose of ambiguous effect might be aided, insofar as notice is concerned, by such a secondary purpose.

It is also, I think, a factor of relevance to the substance vs. procedure issue that the burden on the employer's time, efforts, or property in being compelled to furnish addresses of employees is inconsequential. I do not share the court's conclusion that this requirement "differs only in degree and not in kind" from one that would force an employer to make an assembly hall available on request. I would say that we are dealing with a dichotomy where difference in degree can result in a difference of kind or difference in categorization. This, I think, is illustrated by the above noted procedural requirement that notices of election be posted "in the establishment"—in itself a minimal encroachment on the employer's domain.

While it may be that forcing employers to share with unions their previous monopoly on knowledge of addresses may have a net result of strengthening union power generally, such a result cannot be said to alter substantive "rights" unless the employer's prior easy access to addresses rises to the dignity of a right. *Cf. Sibbach* v. *Wilson,* 312 U.S. 1, 14 (1941). Moreover, the *Excelsior* rule by its terms applies to "all parties"—which include employees hostile to a new union or seeking decertification of an old one. *Cf. Wallace Murray Co.,* 1968-1 CCH NLRB Dec. ¶ 22,256.

I would, for the above reasons, hold that the *Excelsior* rule was valid. But this would not have been an end to the case. There remains the difficult question—how, if at all, can *Excelsior* be properly enforced?[5] The district court ordered that the subpoena be honored. The Board's power lies in the statutory

[5] While what follows goes beyond the issue which divides the court, the writer feels obliged to explore the problem of enforcement which has led to conflicting and often strained statutory interpretation.

language granting "the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. . . ." 29 U.S.C.A. § 161(1).

The authorities which have upheld the subpoena power as available to procure an *Excelsior* list[6] have defined the proceedings leading to representation certification as an investigation and have tortured the concept of "evidence" into something which is helpful in "facilitating a fully informed electorate". *NLRB* v. *Rohlen, supra* at 57. A scrutiny of 29 U.S.C.A. § 161 yields the impression that "evidence" is used throughout in its more traditional sense as data relevant to the proof of a fact in issue.[7] I am sympathetic with the courts which have not been willing to make this leap. *NLRB* v. *Q–T Shoe Co.*, Civil No.

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[6] *NLRB* v. *Rohlen*, 385 F. 2d 52 (7th Cir. 1967); *NLRB* v. *Hanes Corp.*, 384 F. 2d 188 (4th Cir. 1968), *cert. denied* March 4, 1968; *NLRB* v. *British Auto Parts*, 266 F. Supp. 368 (C.D. Cal. 1967); *Swift* v. *Solien*, 56 CCH Lab. Cas. ¶ 12140 (E.D. Mo. 1967); *NLRB* v. *Teledyne, Inc.*, 56 CCH Lab. Cas. § 12229 (N.D. Cal. 1967); *NLRB* v. *Beech-Nut, Inc.*, 56 CCH Lab. cas. ¶ 12237 (S.D. N.Y. 1967).

[7] A similar approach would be to define more narrowly the particular "investigation" as the quest for the names and addresses of the employees. With this frame of reference, the list of such names and addresses could be considered more traditionally as "evidence" relevant to the proof of the object of the investigation. Indeed the subpoena served on appellant contemplated a hearing before the Regional Director at which appellant's president was to testify from corporate books and records concerning the names and addresses of employees. In lieu of such books, a list would be received but only after Board agents had "verified its contents by examination of the subpoenaed books and records." In short, the list is arguably evidence tending to establish the true names and addresses being sought. The difficulty with this approach is that it tortures the word "investigation" into something quite different from its use in 29 U.S.C.A. § 159.

140-67 (D. N.J., filed Jan. 19, 1968); *NLRB* v. *Montgomery Ward, Inc.*, 54 CCH Lab. Cas. ¶ 11659 (M.D. Fla. 1967).

A second solution, suggested by *Q-T Shoe Co.*, *supra*, is that the only way to enforce the *Excelsior* rule is first to secure a determination that refusal by an employer to provide a list of names and addresses of employees constitutes an unfair labor practice under 29 U.S.C.A. § 158(a)(1), and then to seek the aid of the court under 29 U.S.C.A. § 160(e). This would seem plausible until the statutory definitions of unfair labor practices are examined. The Board in *Excelsior* wisely refrained from saying whether refusal to disclose names and addresses of employees would constitute "interference, restraint, or coercion" within the meaning of 29 U.S.C.A. § 158(a)(1). I would say that it is at least doubtful that any one of the effective verbs would cover such a case. "Interfere" is the most adaptable, but its entire thrust is aggressive, not passive. According to Webster's International Dictionary (3d int. ed. 1961), it means such things as "intervene", "intermeddle", and "interpose".

It cannot be said with assurance that a refusal to respond to the *Excelsior* rule—unless, perhaps, a repeated refusal—would predictably be denominated an unfair labor practice.[8] Moreover, constant litigation would ensue over the issue whether, in a given case, the refusal to provide a list had any effect at all on the representation proceeding. For example, in the case at bar appellant moved to quash the subpoena, citing as one ground that the unions already had employee mailing lists.

This leads to the remaining mode of enforcing the rule, if indeed there is any way at all. This is the in-

[8] I would add that I would prefer some lesser sanction for enforcement of procedural rules than that stemming from an unfair labor practice proceeding.

junction. The Congress has indicated by statute that the Board has authority to prescribe "regulations and rules of decision" governing consent elections, 29 U.S.C.A. § 159(c)(4). The Supreme Court has made it clear that "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly . . . [are] matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

While there is a step between statute and rule, not present in *United States* v. *Feaster*, 330 F.2d 671 (5th Cir. 1964), I see no difference in principle. If, in *Feaster*, the statutory right to have access to books and records supported an injunction compelling access to names, addresses, and job classifications of employees, so here a rule predicated on statutory authority to regulate elections and carrying out Congressional policy should support the same remedy. Or, to go back to the observation in *Walling* v. *Brooklyn Braid Co.*, 152 F.2d 938, 941 (2d Cir. 1945), we should "consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted."

Assuming, therefore, the validity of the *Excelsior* rule, I see no other certain way in which it can be enforced than by injunction. And while the absence of other remedy is no adequate justification for judicial invention, I feel that enforcement of the rule lies well within the equity powers of the district court. I would therefore remand the case for consideration of the Board's alternative prayer for an injunction.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 7000

WYMAN-GORDON COMPANY ET AL., DEFENDANTS, APPELLANTS

v.

NATIONAL LABOR RELATIONS BOARD, PLAINTIFF, APPELLEE

JUDGMENT

June 12, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is set aside and the case is remanded with directions to dismiss the complaint.

By the Court:

(S) ROGER A. STINCHFIELD,
Clerk.

APPENDIX C

United States of America Before the National Labor Relations Board

Case No. 11–RC–1876

EXCELSIOR UNDERWEAR INC. AND SALUDA KNITTING INC., EMPLOYER[1]

and

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO, PETITIONER

Case No. 21–RC–8955

K. L. KELLOGG & SONS, EMPLOYER[2]

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 3, AFL–CIO, AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, AFL–CIO, JOINT PETITIONERS

Decisions and Certifications of Results of Elections

In the *Excelsior* case, pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted by the Regional Director for Region 11 on December 6, 1963, among the em-

[1] Referred to herein as the *Excelsior* case.

[2] Referred to herein as the *Kellogg* case.

ployees in the unit described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 247 eligible voters, 246 cast ballots, of which 35 were for, and 206 against, the Petitioner, and 5 challenged. The challenges were insufficient in number to affect the results of the election. The Petitioner filed timely objections to conduct affecting the results.

The objections, as summarized by the Regional Director, related to the following:

(1) The Employer's conduct on November 29 in mailing to all employees an 8-page letter allegedly containing material misstatements as to Union dues and initiation fees, as well as provisions of the National Labor Relations Act, threats of plant closings, strikes and violence, and a predetermined position of refusing to bargain in the event the Union were to be selected as bargaining representative.

(2) The Employer's conduct in refusing to supply the Union with a list of employees and their addresses for the purpose of allowing the Union to answer the letter referred to in Objection No. 1.

(3) The Employer's conduct on or about December 4, in posting a notice at its plants materially misrepresenting Union officials' salaries.

(4) The Employer's conduct on December 5, in giving a speech to employees on Company time containing promises of benefit if the employees did not select the Union as their bargaining representative.

(5) The conduct of certain townspeople of Saluda, South Carolina, in speaking to groups of employees on December 3 and 4, and informing them that other companies interested in relocating in Saluda, South Carolina, would not do so if the Union were selected as bargaining representative. Said townspeople allegedly

also stated that Union representatives were Communistic and did not believe in God.

After investigation, the Regional Director, on January 10, 1964, issued and served upon the parties his Report and Recommendation on Objections, in which he recommended that the objections be overruled and that a certification of election results be issued. Petitioner filed timely exceptions to the Regional Director's report.

In the *Kellogg* case, pursuant to a Stipulation for Certification upon Consent Election, a mail election by secret ballot was conducted by the Regional Director for Region 21 between May 15, 1964, and May 28, 1964, among the employees in the unit described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 31 eligible voters, 30 cast votes, of which 9 were for, and 21 against, the Joint-Petitioners. The Joint Petitioners filed timely objections to conduct affecting the results of the election.

Objection No. 1 alleged that the Employer, on or about May 5, 1964, and May 13, 1964, sent to each employee letters containing certain false and coercive material. Objection No. 2 complained of the Employer's denial of the Joint-Petitioners' request for a list of employees' names and addresses so that it would have an opportunity to mail campaign material to those employees.

After investigation, the Regional Director, on July 16, 1964, issued and served upon the parties his Report and Recommendation on Objections, in which he recommended that Objection No. 1 be sustained, Objection No. 2 be overruled, and the election be set aside and a new election directed. The Joint-Petitioners filed

timely exceptions to the Regional Director's recommendation that Objection No. 2 be overruled.[3]

On April 2, 1965, the National Labor Relations Board, having determined that the Employers' denial of the Petitioners' request for the names and addresses of employees eligible to vote in the elections in these two cases presented a question of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that the two cases be consolidated, and that oral argument be heard before the Board on May 20, 1965. The parties were given permission to file further briefs and directed to focus their attention, in briefs and argument, on the following questions:

> I. Can a fair and free election be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefore?
>
> II. If such information should be made available, should the requirement be limited to situations in which the employer has utilized his knowledge of these names and addresses to mail antiunion letters or literature to employees' homes?
>
> III. If some requirement that the employer make addresses available is to be imposed, how should this be implemented? For example, should such names and addresses be furnished to a mailing service with instructions to mail, at the union's expense, such materials as the union may furnish? Or, should the union be entitled to have the names and addresses?

The Board also invited certain interested parties to file briefs *amicus curiae* and to participate in oral argument. This invitation was accepted by the

[3] The Employer filed timely exceptions to the Regional Director's recommendation with respect to Objection No. 1.

Chamber of Commerce of the United States; American Federation of Labor-Congress of Industrial Organizations; International Union of Electrical, Radio and Machine Workers, AFL–CIO; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW–AFL–CIO. The National Association of Manufacturers, Retail Clerks International Association, AFL–CIO, and Textile Workers Union of America, AFL–CIO, filed briefs but did not participate in the argument. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America participated in the argument but did not file a brief.

Upon the entire record in each of these cases, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner (Joint-Petitioners in *Kellogg*) is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2 (6) and (7) of the Act.

4(a) In *Excelsior* the parties stipulated, and we find, that all production and maintenance employees, plant clerical employees, and janitors at both the Employer's plants in Saluda, South Carolina, excluding all office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) In *Kellogg* the parties stipulated, and we find, that all drillers, derrickmen, rotary helpers, yardmen, mechanics, and welders, excluding all office clerical

employees, professional employees, truckdrivers, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. Exceptions 1, 3, 4, and 5 in *Excelsior* are without merit and hereby rejected.

6. Objection No. 2 in each of these cases poses the question whether an employer's refusal to provide a union with the names and addresses of employees eligible to vote in a representation election should be grounds on which to set that election aside. The Board has not in the past set elections aside on this ground. For, while the Board has required that an employer, shortly before an election, make available for inspection by the parties and the Regional Director a list of employees claimed by him to be eligible to vote in that election, there has been no requirement that this list contain addresses in addition to names. The rules governing representation elections are not, however, "fixed and immutable. They have been changed and refined, generally in the direction of higher standards."[4]

We are persuaded, for the reasons set out below, that higher standards of disclosure than we have heretofore imposed are necessary, and that prompt disclosure of the information here sought by the Petitioners should be required in all representation elections. Accordingly, we now establish a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties

[4] *Sewell Manufacturing Company*, 138 NLRB 66, 70. And see, e.g., *Peerless Plywood Company*, 107 NLRB 427; *Gummed Products Co.*, 112 NLRB 1092; *Hollywood Ceramics Co., Inc.*, 140 NLRB 221; *Dal-Tex Optical Co.*, 137 NLRB 1782, at 1786–7.

pursuant to Section 102.62 of the National Labor Relations Board Rules and Regulations or after the Regional Director or the Board has directed an election pursuant to Section 102.67, 102.69, or Section 102.85 thereof, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.[5]

The considerations that impel us to adopt the foregoing rule are these: "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone."[6] In discharging that trust, we regard it as the Board's function to conduct elections in which employees have

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[5] In the event that the payroll period for eligibility purposes is subsequent to the direction of election or consent-election agreement, the eligibility list shall be filed within 7 days after the close of the determinative payroll period for eligibility purposes. In order to be timely, the eligibility list must be *received* by the Regional Director within the period required. No extension of time shall be granted by the Regional Director except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

However, the rule we have here announced is to be applied prospectively only. It will not apply in the instant cases but only in those elections that are directed, or consented to, subsequent to 30 days from the date of this Decision. We impose this brief period of delay to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated.

[6] *N.L.R.B.* v. *Waterman S. S. Corp.*, 309 U.S. 206, 226; see, also, *N.L.R.B.* v. *Shirlington Supermarkets*, 224 F. 2d 649, 651 (C.A. 4).

the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice.[7] Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available.[8] In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.

As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises,[9] has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communica-

[7] See *General Shoe Corporation*, 77 NLRB 124, 126–127.

[8] See Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 46, 92 (1964).

[9] *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105.

tions can be insured only if all parties have the names and addresses of all the voters.[10] In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.

Nor are employee names and addresses readily available from sources other than the employer. The names of some employees may be secured with the assistance of sympathetic fellow employees, but, in a large plant or store, where many employees are unknown to their fellows, this method may not yield the names and addresses of a major proportion of the total employee complement.[11] Additionally, there are not infrequently employees on layoff status, sick leave, leave of absence, military leave, etc., eligible to vote,[12] yet unknown to their fellow employees. Fur-

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[10] A union that does not know the names or addresses of some of the voters may seek to communicate with them by distributing literature on sidewalks or street corners adjoining the employer's premises or by utilizing the mass media of communication. The likelihood that *all* employees will be reached by these methods is, however, problematical at best. See *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 130 (C.A. 2), cert. denied 376 U.S. 951. Personal solicitation on plant premises by employee supporters of the union, while vastly more satisfactory than the above methods, suffers from the limited periods of nonworking time available for solicitation (generally and legally forbidden during working time, *Peyton Packing Co.*, 49 NLRB 828, 843), and, in a large plant, the sheer physical problems involved in communicating with fellow employees.

[11] See, e.g., *The May Department Stores Co.*, 136 NLRB 797, 808, enforcement denied, 316 F. 2d 797 (C.A. 6), in which, after some 20 months of organizational effort, the union possessed names and addresses of only 1250 out of approximately 3000 eligible voters.

[12] *Vent Control, Inc.*, 126 NLRB 1134 (layoff); *Otarion Listener Corp.*, 124 NLRB 880 (sick leave); *Channel Master Corp.*, 148 NLRB 1343, (leave of absence); *Brown Cigar Company*, 124 NLRB 1435, 1437, footnote 3, (military leave).

thermore, employees are frequently known to their fellows only by first names or nicknames, so that there may be significant problems in obtaining the home addresses even of those employees whose names are known. Finally, all the foregoing difficulties are compounded by the more or less constant turnover in the employee complement of any employer.[13]

In sum, not only does knowledge of employees names and addresses increase the likelihood of an informed employee choice for or against representation, but, in the absence of employer disclosure, a list of names and addresses is extremely difficult if not impossible to obtain. Accordingly, as we have stated, we shall in the future regard an employer's refusal to make a prompt disclosure of this information as tending to interfere with prospects for a fair and free election.[14]

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[13] See 88 Monthly Labor Review, 1022–1024 (August 1965).

[14] While we have discussed the importance of disclosure in the context of the typical case in which the employer and union are the parties engaged in communicating with the electorate, it should be noted that the requirement here imposed applies equally to the case in which an election has been directed upon a petition by an employee or group of employees who seek to decertify an existing bargaining representative or to rescind that representative's authority to enter into a union-security agreement of the sort otherwise authorized by Section 8(a)(3) of the Act. In these latter cases, the petitioning employees would be entitled to the names and addresses of their fellow employees as an aid in their efforts to communicate their arguments against continued union representation or continuance of an existing union-security agreement. Similarly, the union, as a party to the election, would be entitled to employees' names and addresses so as to communicate its position. In short, the disclosure requirement here adopted applies whenever a Board election has been scheduled and insures all parties to the election, whatever their viewpoint, of an opportunity to communicate with the electorate. The only exception is in the expedited election conducted pursuant to Section 8(b)(7)

A requirement that all participants in an election contest have the opportunity to ascertain the names and addresses of the voters is not uncommon. Lists of registered voters in public elections are open to inspection and copying by the public.[15] When stockholders wish to participate in election contests (or other proxy contests), management either must provide them with the names and addresses of other stockholders or mail campaign material for them.[16] Any candidate for union office is entitled to have the union distribute his campaign literature for all members.[17]

We see no reason why similar opportunities should not be available in a representation election. As one thoughtful commentator has stated, "Since the opportunity for both sides to reach all the employees is basic to a fair and informed election, the reasons for requiring disclosure seem just as strong as those leading to similar requirements under other provisions of the law."[18]

(C). In this situation, we believe that the time span between the direction of election and the conduct thereof is too brief, taking into account the time required for the employer to compile and file a list of names and addresses, for the union to be able to make any meaningful use of this information. Hence, in that limited situation, we do not require disclosure.

[15] 29 C.J.S. Elections §50.

[16] 17 C.F.R. 240. 14a–7, 8.

[17] 73 Stat. 532, 29 U.S.C. § 481(c).

[18] Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 99–100 (1964); Cf. Summers, *Judicial Regulation of Union Elections*, 70 Yale L. J. 1221, 1227–1228 (1961). Another manifestation of the concept that all participants in an election should have access to the electorate is embodied in 49 Stat. 1088, as amended, 47 U.S.C. § 315(a), which provides for equal time for political candidates on radio and television.

While the rule we here announce is primarily predicated upon our belief that prompt disclosure of employee names and addresses is necessary to insure an informed electorate, there is yet another basis upon which we rest our decision. As noted (*supra*, p. [19a]), an employer is presently under no obligation to supply an election eligibility list until shortly before the election. The list, when made available, not infrequently contains the names of employees unknown to the union and even to its employee supporters. The reasons for this are in large part the same as those that make it difficult for a union to obtain, other than from the employer, the names of all employees, i.e., large plants with many employees unknown to their fellows, employees on layoff status, sick leave, military leave, etc. With little time (and no home addresses) with which to satisfy itself as to the eligibility of the "unknowns", the union is forced either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will, we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity. Furthermore, *bona fide* disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significances of a single vote is apt to loom large in the par-

ties' calculations. Thus, the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation.

The arguments against imposing a requirement of disclosure are of little force, especially when weighed against the benefits resulting therefrom. Initially, we are able to perceive no substantial infringement of employer interests that would flow from such a requirement. A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election. Cf. *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing *per curiam*, 235 F. 2d 319 (C.A. 9); *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149; *F.C.C.* v. *Schreiber*, 381 U.S. 279.

The main arguments that have been presented to us by the Employers and the *amici curiae* supporting the Employers relate not to any infringement of *employer* rights flowing from a disclosure requirement but rather to an asserted infringement of *employee* rights. Thus, it is argued that if employees wished an organizing union to have their names and addresses, they would present the union with that information. By compelling the employer to provide the union with information that the employees have chosen not to divulge, the Board, it is asserted, compels employer interference with the Section 7 right of employees to

refrain from union activities. We regard this argument as without merit. An employee's failure to provide a union with his name and address, whether due to inertia, fear of employer reprisal, or an initial predisposition to vote against union representation, is not, as we view it, an exercise of the Section 7 right to refrain from union activity. Rather, in the context with which we are here concerned—a Board-conducted representation election—an employee exercises this right by voting for or against union representation.

Similarly, we reject the argument that to provide the union with employee names and addresses subjects employees to the dangers of harassment and coercion in their homes. We cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy.[19] We do not, in any event, regard the mere possibility that a union will abuse the opportunity to communicate with employees in their homes as sufficient basis for denying this opportunity altogether. See *Martin* v. *City of Struthers*, 319 U.S. 141; *Staub* v. *City of Baxley*, 355 U.S. 313.[20]

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[19] See *Poinsett Lumber & Mfg. Co.*, 116 NLRB 1732; *Orleans Mfg. Co.*, 120 NLRB 630, 634; *Plant City Welding and Tank Company*, 119 NLRB 131, 133–134.

[20] Another argument made against disclosure of employee names and addresses in connection with an election proceeding is that a union might petition for an election with no real intention of participating therein, but solely to obtain employee names and addresses, intending, on receipt thereof, to withdraw the election petition and utilize its newly-acquired information as a basis for further organizational efforts. We think that the likelihood of such misuse of the Board's processes is minimized by our practice of requiring at least a 30 percent showing of representation before further processing the usual RC (union) petition, and also by our practice of imposing (absent a showing

The argument is also made (by the Employer in the *Excelsior* case) that under the decisions of the Supreme Court in *N.L.R.B.* v. *Babcock & Wilcox*,[21] and *N.L.R.B.* v. *United Steelworkers (Nutone, Inc.)*,[22] the Board may not require employer disclosure of employee names and addresses unless, in the particular case involved, the union would otherwise be unable to reach the employees with its message. We disagree. We think that the issue presented by these cases is distinguishable from that presented in *Babcock* or *Nutone* and that, even assuming the availability of other avenues by which a union *might* be able to communicate with employees, we may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election.

Initially, as we read *Babcock* and *Nutone*, the existence of alternative channels of communication is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest—such as the employer's interest in controlling the use of property owned by him. Here, as we have shown, the employer has no significant interest in the secrecy of employee names and addresses. Hence, there is no necessity for

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of good cause to the contrary) a 6-month ban on entertaining an election petition filed by a union which has withdrawn from an election after a hearing has been held or a consent-election agreement approved by the Regional Director. See *Campos Dairy Products, Ltd.*, 107 NLRB 715. In any event, in view of the importance of disclosure for a fair and free election, we do not regard the bare possibility that *some* unions may misuse the information disclosed as grounds for our denying *all* unions (as well as employees who seek to unseat unions, see footnote 14, *supra*) access to employee names and addresses.

[21] 351 U.S. 105.

[22] 357 U.S. 357.

the Board to consider the existence of alternative channels of communication before requiring disclosure of that information. Moreover, even assuming that there is some legitimate employer interest in nondisclosure, we think it relevant that the subordination of that interest which we here require is limited to a situation in which employee interests in self-organization are shown to be substantial. For, whenever an election is directed (the precondition to disclosure) the Regional Director has found that a real question concerning representation exists; when the employer consents to an election, he has impliedly admitted this fact."[23] The opportunity to communicate on company premises sought in *Babcock* and *Nutone* was not limited to the situation in which employee organizational interests were substantial, i.e., in which an election had been directed; we think that on this ground also the cases are distinguishable. Finally, both *Babcock* and *Nutone* dealt with the circumstances under which the Board might find an employer to have committed an unfair labor practice in violation of Section 8 of the Act, whereas the instant cases pose the substantially distinguishable issue of the circumstances under which the Board may set aside an election. "[T]he test of conduct which may interfere with the 'laboratory conditions' for an election is

[23] Section 9(c)(1), NLRA; see, also, Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Sec. 101.18, 29 C.F.R. 101.18. We also require disclosure when an election is directed pursuant to an employee petition to decertify a currently recognized union or to rescind the authority of such a union to enter into a "union-shop" agreement. See footnote 14, *supra*. In these situations, the employee interest, though opposed to union representation or membership, is also required to be substantial before an election will be directed. See Section 9(c)(1)(A)(ii), 9(e)(1), NLRA; Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Section 101.18, 101.27, 29 C.F.R. 101.18, 101.27.

considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)."[24] Whether or not an employer's refusal to disclose employee names and addresses after an election is directed would constitute "interference, restraint, or coercion" within the meaning of Section 8(a)(1) of the Act, despite the existence of alternative channels of communication open to the union, is a question on which we express no view because it is not before us. However, we are persuaded, for the reasons previously stated, that disclosure is one of the "safeguards necessary to insure the fair and free choice of bargaining representative by employees"[25] and that an employer's refusal to disclose, regardless of the existence of alternative channels of communication, tends to interfere with a fair and free election. Thus *Babcock* and *Nutone,* which dealth with the substantially different issue of whether the employers' conduct violated Section 8(a)(1), are, for this reason also, inapposite.

Finally, we wish to state our reasons for rejecting the approaches to the disclosure issue suggested by questions II and III in the Notice of Hearing. We do not limit the disclosure requirement to the situation in which the employer has mailed antiunion literature to employees' homes (question II) because we believe that access to employee names and addresses is fundamental to a fair and free election regardless of whether the employer has sent campaign propaganda to employees' homes.[26] We do not limit the re-

[24] *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787; see also *General Shoe Corporation*, 77 NLRB 124, 126–127.

[25] *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 330; see also *N.L.R.B.* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226.

[26] Compare *May Department Stores Co.*, 136 NLRB 797, enforcement denied, 316 F. 2d 797 (C.A. 6); *Montgomery Ward & Co.*, 145 NLRB 846, enfd. in part, 339 F. 2d 889 (C.A. 6).

quirement of disclosure to furnishing employee names and addresses to a mailing service (question III) because this would create difficult practical problems and because we do not believe that the union should be limited to the use of the mails in its efforts to communicate with the entire electorate.[27]

Inasmuch as the rule we have here announced is to be applied prospectively only (see footnote 5, *supra*), we reject Petitioners' exceptions to the Regional Directors' recommendations with respect to Objection No. 2 in both *Kellogg* and *Excelsior*. As we have also rejected the Petitioner's remaining exceptions in *Excelsior*, we shall accept the Regional Director's recommendation and certify the results of that election. With respect to *Kellogg*, while we have rejected the Joint Petitioners' exception to the Regional Director's recommendation as to Objection No. 2, the Employer has filed exceptions to the Regional Director's

[27] See *S. & H. Grossinger's, Inc.*, 156 NLRB No. 20. See, also, Eldersveld and Dodge, "Personal Contact or Mail Propaganda: An Experiment in Voting Turnout and Attitude Change" in Katz, *Public Opinion and Propaganda*, 532, 541 (1954); Karsh, *Diary of a Strike*, 106 (1958); Klapper, *The Effects of Mass Media*, pt. 2, pp. 9–14 (1949).

In the briefs and arguments of the Employers and *amici curiae* supporting the Employers, much has been made of Board decisions setting aside representation elections because an employer or his agents called upon all or a majority of employees in their homes in the period preceding the election. See, e.g., *Peoria Plastic Co.*, 117 NLRB 545. The argument is made that it would be inequitable for the Board to preclude employers from visiting employees in their homes and at the same time insist that unions be furnished with employee names and addresses so that they may engage in home visits. The short answer to this argument is that employers are free to communicate with their employees in the plant; a union, as a practical matter, is severely limited in its efforts at in-plant communications. See *Plant City Welding and Tank Co.*, 119 NLRB 131, 133–134; see, also, footnote 10, *supra*.

recommendation that the election be set aside on the basis of two campaign letters sent by the Employer and that a new election be directed. We have read the letters of the Employer in their entirety and the Union's propaganda and conclude that, under all the circumstances, the Employer's letters could clearly be evaluated by the employees as partisan electioneering and do not warrant setting the election aside.[28] Accordingly, we shall also certify the results of that election.

CERTIFICATIONS OF RESULTS OF ELECTIONS

It is hereby certified, in *Excelsior Underwear Inc.* and *Saluda Knitting Inc.,* Case No. 11–RC–1876, that a majority of the valid ballots has not been cast for Amalgamated Clothing Workers of America, AFL–CIO, and that the said labor organization is not the exclusive representative of the employees in the unit herein found appropriate, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

It is hereby certified, in *K. L. Kellogg & Sons,* Case No. 21–RC–8955, that a majority of the valid ballots has not been cast for International Union of Operating Engineers, Local No. 3, AFL–CIO, and International Union of Operating Engineers, Local Union No. 12, AFL–CIO, and that said labor organizations are not the exclusive representative of the employees in the unit herein found appropriate, within the

[28] Member Brown would accept the Regional Director's findings and recommendation.

meaning of Section 9(a) of the National Labor Relations Act, as amended.

Dated, Washington, D.C., February 4, 1966.

[SEAL]

NATIONAL LABOR RELATIONS BOARD,
FRANK W. MCCULLOCH, *Chairman.*
JOHN H. FANNING,
GERALD A. BROWN,
HOWARD JENKINS, JR.,
SAM ZAGORIA, *Members.*

APPENDIX D

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * * *

SEC. 9. (c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative as defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be con-

ducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

SEC. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States * * *.

(c). The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear

argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any

matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

2. The relevant provisions of the Administrative Procedure Act, as amended (60 Stat. 237, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551, *et seq.*) are as follows:

SEC. 552. PUBLIC INFORMATION . . .

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— * * *

* * * * * * *

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *

* * * * * * *

SEC. 553. RULE MAKING

* * * * * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are im-

practicable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

APPENDIX E

In the United States Court of Appeals for the Fifth Circuit

No. 24802

HOWELL REFINING COMPANY, PETITIONER,
versus
NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board (Texas Case)

August 12, 1968

Before RIVES, GEWIN and THORNBERRY, Circuit Judges

GEWIN, Circuit Judge: Howell Refining Company petitions this court to review and set aside an order of the National Labor Relations Board issued against it on May 10, 1967. The order requires the company to cease and desist from unfair labor practices, to bargain with the Oil, Chemical and Atomic Workers International Union, and to post appropriate notices. The Board cross-petitions for enforcement of its order. We deny enforcement and remand the case for further proceedings.

To place the questions presented in context we shall summarize the events leading up to the Board's May 10 order. On March 23, 1966, the union filed a representation petition with the Board requesting certification as the bargaining agent for a unit consisting of all truck and transport drivers, truck and auto mechanics, and production and maintenance employees in the company's San Antonio and Corpus Christi, Texas, plants. The company contended that separate units at each of the two plants were appropriate. Following a hearing the Regional Director determined that the multi-plant unit requested in the union's petition was warranted. The company also objected to the exclusion from the bargaining unit of certain clerical employees, but the Regional Director resolved this issue in favor of the union also. The company promptly requested that the Board review the Regional Director's decision, urging the appropriateness of separate units and the inclusion in each unit of the clerical employees. The Board denied the request on the ground that it "raised no substantial issues warranting review except as to the unit placement of yield clerks." Consequently, the Regional Director's decision was amended to permit yield clerks to vote subject to challenge.

An election in June resulted in a union victory, thirty-eight votes being cast for the union, eighteen against the union, and four challenged ballots. The company filed timely objections to the election, alleging that conduct attributable to the union had improperly influenced its outcome. It also objected again to the Regional Director's determination of the appropriate unit. Additionally, the company attacked the "names and addresses" rule established by the Board in *Excelsior Underwear, Inc.*[1] After conducting an ad-

[1] 156 N.L.R.B. No. 111, 1966 CCH NLRB ¶ 20,180.

ministrative investigation, the Regional Director issued on August 19, 1966, a Supplemental Decision, Order and Certification of Representative in which he overruled the company's objections and certified the union as the exclusive bargaining representative. In September the company filed timely objections to the supplemental decision, contending that the Regional Director's rulings were erroneous and that, in any event, a formal hearing on the objections had been improperly denied. On November 3, 1966, the Board denied the company's request on the ground that it raised no substantial issues warranting review.

Despite the certification by the Board, the company refused to recognize or bargain with the union. On December 15, 1966, in response to the union's charges, a complaint issued against the company alleging violations of section 8(a) (1) and (5) of the National Labor Relations Act.[2] In its answer the company attacked the validity of the certification and again denied the appropriateness of the bargaining unit. General Counsel filed a motion for summary judgment on the ground that the company's answer had raised no triable issues of fact. In its answer in opposition to the motion, the company reasserted the invalidity of the union certification and attached copies of documents and other evidence previously submitted in the representation proceedings. In addition, the company stated that it had been bargaining with the union in good faith since January 16, 1967, and proposed that the disposition of the motion be suspended pending the outcome of negotiations. The union opposed the request on the ground that the company had not recognized it as the certified representative of the employees. The General Counsel also opposed the request on the basis that occurrences sub-

[2] 29 U.S.C. § 158(a) (1), (5) (1964).

sequent to December 1966 were irrelevant to the issues presented by the complaint.

The Trial Examiner found that the case was not mooted by subsequent negotiations between the parties. He further concluded that the issues raised by the company had already been decided in the representation proceeding; that he was bound by those determinations; and that, consequently, no hearing was necessary in the absence of newly discovered or previously unavailable evidence. Accordingly, the Examiner found that the company had violated section 8(a) (1) and (5) of the Act, and granted the motion for summary judgment. The Board affirmed the Examiner's ruling, adopted his finding that the company had violated the Act by refusing to recognize and bargain with the union, and issued the order which the company now seeks to set aside.

The company contends that the Board's order should be vacated because (1) the Board abused its discretion in determining that a multi-plant unit was appropriate; (2) the Board erred in failing to find that the disclosure of the names and addresses of employees to the union invalidated the election; (3) the Board erred in failing to find that the union and its supporters engaged in preelection conduct that rendered a free expression of choice impossible; and (4) the Board's refusal to grant a post-election hearing on the company's claim of unlawful union conduct constituted a denial of due process.

We have given careful consideration to each of the above contentions and we have reviewed the entire record. We find no abuse of discretion in the Board's determination that a multi-plant bargaining unit is appropriate. We also find that the submission by the company of employees' names and addresses as required by the *Excelsior* rule does not invalidate the

election. However, we do not reach the question of whether there was interference with the free choice of the employees because we conclude that this question should not have been decided by the Board summarily and that the company should have been granted a hearing. Consequently, the order of the Board is set aside and the case is remanded to the Board for a hearing on the company's claim that conduct attributable to the union generated such an atmosphere of fear, concern, and confusion among the employees that a free expression of choice in the election was rendered impossible.

* * * * *

II

The company contends that the election should have been set aside because it was forced, under protest, to comply with the Board's *Excelsior* rule. This rule requires employers to file with the Regional Director a list containing the names and addresses of all employees eligible to vote in the election. The Regional Director then makes the list available to all parties involved in the election. The company's primary contention is that the disclosure of this information afforded the union an unfair and inequitable opportunity to propagandize through home visitation and made possible certain alleged coercive conduct on the part of the union.[*]

The Board's *Excelsior* rule was adopted to guarantee all participants in the election access to the electorate and to ensure an informed electorate. The rule eliminates the time-consuming process of investigating challenges to voter eligibility on the eve of elections

[*] The alleged improper conduct of the union is discussed in part III of this opinion.

solely because of a lack of knowledge of voters' identity.[7] We find the rule to be a valid exercise of the Board's power to ensure employees a fair and free choice in the selection of their representative.[8] The possibility that the union or its supporters abused the opportunity of communicating with the employees in this case is insufficient, in our opinion, to invalidate the *Excelsior* rule or to set aside the election.[9]

* * * * * *

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[7] Excelsior Underwear, Inc., 156 N.L.R.B. No. 111, 1966 CCH NLRB ¶ 20,180.

[8] *See* NLRB v. Rohlen, 385 F.2d 52 (7 Cir. 1967); NLRB v. Hanes Hosiery Div., 384 F.2d 188 (4 Cir. 1967), *cert. denied*, 390 U.S. 950 (1968). Although the company does not raise the point, the *Excelsior* rule has been held invalid in the First Circuit because of the manner of its adoption. Wyman-Gordon Co. v. NLRB, ——— F.2d ——— (1 Cir. 1968) [No. 7000, June 12, 1968] (two-to-one decision). We take a different view of the matter and decline to follow the *Wyman-Gordon* case.

[9] See NLRB v. Duncan Foundry & Mach. Works, Inc., 7 Cir. 1968, ——— F.2d ——— [No. 16672, January 16, 1968].

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In the Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 463.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
WYMAN-GORDON COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT AND CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

In opposition and cross-petition for certiorari, Quentin O. Young, attorney for Wyman-Gordon Company *et al.*, answers the petition of the Solicitor General on behalf of the National Labor Relations Board for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, and respectfully cross-petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit on the merits of the case involved.

Opinions Below.

The opinion of the Court of Appeals (Petitioner's App. A, pp. 1a-12a) is not yet officially reported. The opinion of the District Court (R. 118-124)[1] is reported at 270 F. Supp. 280. The decision of the Board's Regional Director, out of which the instant case arises (R. 11-13), is not officially reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 12, 1968 (Petitioner's App. B, p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether the National Labor Relations Board violated the Administrative Procedure Act in its promulgation of the *Excelsior* rule.

2. Whether the Board may seek the assistance of a Federal District Court in obtaining the list of names and addresses required under the *Excelsior* rule.

3. Whether the Board's *Excelsior* rule is invalid because of the Board's failure to comply with the Administrative Procedure Act (5 U.S.C. c. 19, § 1001 *et seq.*).

4. Whether the *Excelsior* rule constitutes an invasion of the right of privacy of the employees of the Company.

5. Whether the *Excelsior* rule is contrary to the decisions of the Courts, including the United States Supreme Court, and is inapplicable in the present case inasmuch as

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[1] "R." refers to the record appendix, a copy of which has been filed along with the petition.

the unions had adequate access to the employees, their names and their home addresses.

A. Whether the Board's conclusion in *Excelsior* is contrary to Court decisions.

B. Whether the unions had adequate means and alternative methods of ascertaining the employees' names and addresses.

6. Whether the *Excelsior* rule is illegal inasmuch as it promotes an invalid dual standard of conduct between employers and employees.

7. Whether the *Excelsior* rule is a violation of section 8(a)(2) and section 302 of the National Labor Relations Act as amended.

8. Whether the subpoena, the subject of this proceeding, calls for the production of records exceeding the Board's and the Court's statutory authority, and is not supported by section 11 of the Act.

Statutes Involved.

The relevant statutory provisions are set forth in Petitioner's Appendix D, pp. 34a-39a.

Statement of Facts.

On July 12, 1966, the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as the "Boilermakers"), filed a petition with the First Region of the Board, claiming that they represented a majority of the defendants' employees and requesting that an election be held by

the Board to ascertain whether or not they did, in fact, so represent a majority (Board's Exhibit A, R. 9 *et seq.*).

On August 26, 1966, a formal hearing was held on the Boilermakers' petition; and at this hearing the United Steelworkers of America, AFL-CIO, intervened (R. 11). On September 6, 1966, the Regional Director of the First Region directed that an election be held to determine whether the employees of the defendants desire to be represented by the Boilermakers, by the Steelworkers or by neither union (R. 13).

During the course of the hearing on August 26, the defendants, by counsel, advised the Board that in their opinion the requirements of the *Excelsior* case were invalid and that the Board was without justification to require the defendants to produce a list of the names *and addresses* of its employees wherein the sole purpose of supplying such a list was that the list could be transmitted to the unions to aid and abet them in organizing the defendants' employees.

Pursuant to the direction of election, an election was held on September 29, resulting in the following tally of ballots:

Approximate number of eligible voters	1,750
Void ballots	10
Votes cast for petitioner	226
Votes cast for intervenor	555
Votes cast against participating labor organizations	903
Valid votes counted	1,684
Challenged ballots	6
Valid votes counted plus challenged ballots	1,690

Thereafter, within the prescribed time limitation, both the Steelworkers and the Boilermakers filed objections to

the election, based upon the defendants' failure to comply with the *Excelsior* list. On October 19, 1966, the Regional Director upheld these objections.

Thereafter the Board denied the defendants' request for a review of the Regional Director's findings on these objections (R. 39). Finally, on December 29, 1966, the Board issued its subpoena requiring the defendants to produce the aforementioned list of names and addresses of its employees (Board's Exhibit G, R. 42).[2]

Argument.

The Board, in its petition, misconstrues the Circuit Court's application of *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194.

In that case the Supreme Court found that an administrative agency could retroactively establish a new rule through the adjudicatory process when the decision was between an agency and an individual party. In the instant proceeding the Board did not apply its *Excelsior* rule to the Excelsior Corporation but made it effective thirty days subsequent to establishing the *Excelsior* rule. It is in this area that the Board's brief miscontrues the effect of *Excelsior* on the instant proceeding, as Judge Aldrich states in his decision below:

> "In presently justifying its position the Board does not seek to carve out for itself the special defense suggested by our brother Coffin in dissent, but asserts that what it did was proper administrative action approved by the Court in *SEC* v. *Chenery Corp.*, 1947, 332 U.S. 194. It is, of course, true that the Court there recog-

[2] The remaining facts are adequately set forth in the Petition for Certiorari.

nized that an adjudicatory administrative body may promulgate rules through decision as well as through more formal rule-making procedures. This is a necessary and inevitable consequence of adjudication. Normally the Board must decide cases between party and party, as the Commission did in *Chenery*. The result, if stare decisis is to mean anything, is that any principle, once decided, stands as a guide for the future and may be spoken of as a rule. Examples are legion. Sometimes, until the Board spoke, all parties may have thought the 'rule' was the other way. This may be unfortunate, but it is normally unavoidable, as *Chenery* demonstrates.

"In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. Chenery in no fashion, suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress." *Wyman-Gordon* v. *National Labor Relations Board*, 68 L.R.R.M. 2483 at 2485.

Moreover, the Board knew, in effect, that it was establishing a new substantive rule of law when it invited certain trade associations and labor unions to file amicus briefs before it.

The other cases cited by the Board in regard to the promulgation of an administrative rule are equally inapposite to the present situation inasmuch as they involve situations wherein an administrative agency has ruled against a specific party and has attempted to establish a rule prospectively.

The respondent petitioner respectfully cross-petitions for a writ of certiorari to review the Board's authority to issue the *Excelsior* decision, because of its importance in the interpretation of the National Labor Relations Act, as amended, and the authority of the Board to issue decisions of this nature.

It is submitted that no single issue to come before the Board in recent years has been the subject of so much litigation as has the Board's *Excelsior* decision, nor have the Courts issued such conflicting decisions in their examination. See Appendix.

I.

The Board's Excelsior Rule is Invalid because of the Board's Failure to Comply with the Administrative Procedure Act (5 U.S.C. C. 19, § 1001 et Seq.).

In establishing the *Excelsior* rule the Board has clearly circumvented the requirements of the Administrative Procedure Act. Indeed, the Board recognizes this fact and attempts to justify its actions on the ground that it permitted certain associations of employers and certain labor unions to intervene in the *Excelsior* case and to file briefs and make oral arguments therein.

It is respectfully submitted that the Board's procedure in *Excelsior* completely fails to comply with the requirements of the Administrative Procedure Act. Again, in a most unprecedented manner, the Board decided that the rule announced in *Excelsior* would not be made retroactive so as to be applicable to the *Excelsior* case itself, but would become effective thirty days after the publication of the *Excelsior* decision. (*Cf.* Siegel, Bureau of National Affairs Daily Reporter, No. 222; 11-15-67.)

From these two factors alone, it is clear that the Board recognized that it was establishing a new rule or procedure

in the conduct of election proceedings under Section 9 of the Act. However, despite this lip-serving attention to the provisions of the Administrative Procedure Act, there can be no question that the Board has failed to comply with the requirements established by Congress for Administrative Agencies in establishing rules and regulations.

Section 2(c) of the Act defines a rule or a regulation as follows:

> "'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

Sections 3 and 4 in pertinent part provide the method by which rules and regulations are to be promulgated by administrative agencies:

> "Every agency shall separately state and currently publish in the Federal Register . . . (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public . . .
>
> "(a) General notice of proposed rule making shall be published in the Federal Register . . . and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> "(b) After notice required by this section, the agency shall afford interested persons an opportunity

to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. . . .

"(c) The required publication of service of any substantive rule . . . shall be made not less than thirty days prior to the effective date thereof . . ."

In the course of its promulgation of the *Excelsior* rule, it is clear that the Board has never published the rule in the Federal Register nor provided interested parties with an opportunity to present their positions to the Board before the rule becomes effective. The Board cannot and does not claim that the *Excelsior* rule in any way followed the requirements of the Act as set forth herein. Indeed, the fact that it did permit certain trade associations and certain labor organizations to intervene in the proceedings is a clear indication that they have denied to other persons interested their right to present their views in full. It is respectfully submitted that this Court must dismiss the present Complaint because of the Board's failure to comply with the required provisions of the Administrative Procedure Act (*cf. Wyman-Gordon* v. *National Labor Relations Board, supra*).

II.

The Excelsior Rule Constitutes an Invasion of the Right of Privacy of the Employees of the Company.

The Board's stated purpose of espousing the *Excelsior* rule is to turn the list of the names and addresses of the employees over to the union or unions involved so that the

unions may directly contact the employees either by mail, by telephone, or by personal visits to the employees' homes.

The idea that an employer must give to strangers the names and addresses of his employees is repugnant to our democratic right of privacy. The Board's statement that its policy is based upon a desire that both sides be given an opportunity to present their positions is patently absurd and begs the question of its companion argument that the purpose of the lists is to minimize challenges at the time of the election. The statute is barren of any requirement of the nature of the *Excelsior* case.

The Supreme Court in *Griswold* v. *State of Connecticut*, 381 U.S. 479, 484-485 (1965), strongly protested the invasion of an individual's right of privacy. It said:

> "The Fourth and Fifth Amendments were described in *Boyd* v. *United States*, 116 U. S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp* v. *Ohio*, 367 U. S. 643, 656, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' "

The Board's desire to irresponsibly publish the names and addresses of the employees is in direct conflict with the holding of the United States Supreme Court in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 462 (1958), wherein the Court said:

> "We think that the production order [for the names of the members of the NAACP in Alabama] . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."

It should be remembered that in the *Alabama* case the list of names and addresses was to be turned over to the state Attorney General for his use, and his use only. Certainly, it is a far cry from that situation to the situation where the Board intends, and proudly proclaims, that it will turn over the list to union officials for whatever purpose they seek to obtain.

One of the major bases upon which the Board founds its *Excelsior* decision is the fact that the giving of such lists will assist the Board and the parties to the election, in resolving the eligibility of the employees to vote. The Board has for a long period of time required the employer, several days prior to the election, to submit to it a list of eligible voters. This list is then reviewed by the union or unions involved to determine whether the list is correct. The Board admits that on September 26, 1966, the employer did in fact submit such a list to the unions involved and the list was thoroughly reviewed by representatives of both unions (R. 36). However, the Board would have the Court believe that this is insufficient and that failure to supply to the unions both names and addresses of employees will cause numerous challenges when employees exercise their right to vote. This is a completely false and unwarranted assumption and is denied by the Tally of Ballots. The Tally indicated that of a total number of eligible voters of some 1,750, there were exactly 6 challenges. The number of ballots that were challenged in the election of September 29 amount to less than .05 per cent. It is clear, therefore, that the challenged ballots could in no way affect the results of the election; and it is further clearly demonstrated that the Company's failure to supply the *Excelsior* list in no way affected the number of challenges in the election.

III.

The Excelsior Rule is Contrary to the Decisions of the Courts, Including the United States Supreme Court, and is Inapplicable in the Present Case inasmuch as the Unions had Adequate Access to the Employees, their Names and their Home Addresses.

A. The Board's Conclusion in Excelsior is Contrary to Court Decisions.

In *Excelsior* the Board has adopted a doctrine that cannot withstand the thrust of decisions of the United States Supreme Court, presuming an imbalance of communication between an employer and the union or unions seeking to represent employees. The Board in *Excelsior* has determined that it is necessary that the unions be supplied with the names and addresses of employees.

This Court has consistently held that a union does not have, except in unusual circumstances, such a right of communication. In *National Labor Relations Board* v. *United Steelworkers of America CIO* (NuTone, Inc.), 357 U.S. 357 (1958), the Court clearly upheld the principle that a union does not have a statutory right under the provisions of the Act to distribute union literature on company time and on company property. In order to establish such rights, the Court held that it had to be affirmatively shown that an employer's rule barring such activity actually limited or reduced the union's ability to campaign among the employees.

> "Of course the [employer's] rules had the effect of closing off one channel of communication [to the union]; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of

every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. Cf. *Bonwit Teller, Inc.*, v. *Labor Board*, 197 F. 2d 640, 646 [30 L.R.R.M. 2305]; *Labor Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78, 84 [34 L.R.R.M. 2293] (concurring opinion). No such mechanical answers will avail for the solution of this non-mechanical complex problem in labor-management relations. If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules. The Board, in determining whether or not the enforcement of such a rule in the circumstances of an individual case is an unfair labor practice, may find relevant alternative channels available for communications on the right to organize. When this important issue is not even raised before the Board and no evidence bearing on it adduced, the concrete basis for appraising the significance of the employer's conduct is wanting [42 L.R.R.M. 2327]."

Earlier, this Court had established this principle in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Here, in determining the area of assistance which an employer may or may not give to a union, the Court said:

"This is not a problem of always open or always closed doors for union organization . . . *The employer may not affirmatively interfere with organiza-*

tion; the union may not always insist that the employer aid organization." (Emphasis added.)

Two Court of Appeals decisions are most significant and most applicable to the present situation.

In *May Department Stores* v. *National Labor Relations Board*, 316 F. 2d 797 (C.A. 6, 1963), the Court of Appeals overruled a decision of the Board wherein the Board had found that a union was entitled to equal time on company property to respond to noncoercive yet strongly anti-union employer's speeches. The Court found that the Board had not established the nonaccessibility of the employees, and therefore the unusual remedy sought to be established by the Board could not stand the test of the Supreme Court decisions *supra*.

The Court said at 801:

> ". . . neither the use of the magic word 'imbalance' nor the characterization of alternative avenues of communication as 'ineffective' . . . can give the Union a right of access which the Supreme Court of the United States has refused to recognize and which it does not possess."

In a similar vein, the Tenth Circuit, at an earlier date, denied the right of a union's access to channels of communication other than those that are normally available. *Cf. National Labor Relations Board* v. *Seamprufe, Inc.*, 222 F. 2d 858 (C.A. 10, 1955).

In affirming the *Seamprufe* approach in this attempt to rationalize an excessive right of communication, this Court, in *Babcock & Wilcox, supra*, stated at page 112:

> "It is our judgment, however, that an employer may validly post his property against non-employee distri-

bution of union literature *if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message* and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." (Emphasis added.)

In the instant case there has been no finding that there was a lack of accessibility to the two unions involved towards the employees of the employer. Indeed, no such contention is made by the Board, nor can it be made. As a matter of actual practice, the Board included in its Direction of Election a demand that the *Excelsior* list be supplied. (*Cf.* Exhibit B, R. 13.) This automatic application of the *Excelsior* rule is in defiance of the decisions of the Supreme Court cited herein.

B. The Unions had Adequate Means and Alternative Methods of Ascertaining the Employees' Names and Addresses.

The election conducted on September 29, 1967, was the fifth such election in which the Boilermakers had sought to gain recognition of the Company's employees (R. 118). During this period of time, the Boilermakers have constantly maintained an office and a staff in Worcester, Massachusetts. They have consistently subjected the Company's employees to organizational campaigns and requests for membership in their union. It would be completely naïve to presume for a moment that the Boilermakers dur-

ing this period of time could not have established contact with each and every employee of the Company.

Over the course of the years, the Boilermakers, in addition to the usual organizational activity of distributing handbills and leaflets at the Company gates, have had innumerable meetings in and around Worcester. During past organizational campaigns, the Boilermakers have printed ads in the local Worcester newspapers. They have broadcast radio appeals on the local Worcester radio stations. In fact, during one campaign they published a telephone number which could be called by the employees of the Company to receive propaganda appeals during the day and night. This so-called "hot line" was carried out over an extended period of time and with full knowledge not only of all Wyman-Gordon employees but indeed of all the citizens of the Worcester area. Upon such a showing of ingenuity and initiative, it ill becomes the Board at this date to state that it is necessary that the Boilermakers receive from the Company a list of the names and addresses of the Company's employees.

In regard to the Steelworkers, and with equal application to the Boilermakers, there is available to anyone with the initiative to do so a City Directory of Metropolitan Worcester area. This Directory can be purchased by anyone who desires to do so or it can be inspected in the Worcester public libraries by anyone who does not wish to pay the purchase price.

The City Directory lists all individuals living in metropolitan Worcester and indicates not only their home addresses but also their employer and the position which they hold with the employer (Exhibit B, R. 55).

It is clear from the foregoing that the unions here had available to them sufficient sources of information in order to actively affect the type of campaign which the Board

contemplates under the *Excelsior* rule. The failure of the unions to make use of these readily available, and varied and multiplicity of approaches does not warrant the implications imposed upon the employer in *Excelsior*.

IV.

The Excelsior Rule is Illegal inasmuch as it Promotes an Invalid Dual Standard of Conduct between Employers and Employees.

The Board dwells at great length on the value of the *Excelsior* rule in promoting better understanding of the issues involved in a union election. It indicates that the *Excelsior* rule will facilitate a union in its communications with employees by mail, by telephone, and finally by visits to the employees' homes.

The Board fails to give the Court a proper picture of the situation as it exists as a result of the Board and Court decisions between the rights, privileges and obligations of a union against the rights, privileges and obligations of an employer.

In an organizational campaign, a union has an absolute right to make any promises of benefits that it allegedly can gain from the employer. It has a somewhat limited but a very real right of harassment and coercion in obtaining employees' signatures on membership cards.

In contrast to this, an employer is under a statutory admonition proscribing such activities as promises, threats or coercion (*National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405 (1964); *National Labor Relations Board* v. *Bailey Co.* (C.A. 6), 180 F. 2d 278 (1950)). Indeed, it has now become a *per se* violation of the Act for an employer to visit the homes of his employees and to discuss

union matters and union organizational activities (*Peoria Plastics Co.*, 117 N.L.R.B. 545 (1957)). It is an unfair labor practice for an employer to ask an employee whether or not he belongs to the union. It is an unfair labor practice for an employer to discuss union activities in the "Boss's office" (*cf. General Shoe Corporation*, 77 N.L.R.B. 124 (1948); 97 N.L.R.B. 499 (1951); *National Caterers of Virginia*, 125 N.L.R.B. 110 (1959)).

In promulgating the *Excelsior* rule, the Board in its militancy seeks to further the advocacy of unionism without justification or foundation in statutory authority given to it by Congress.

V.

The Excelsior Rule is a Violation of Section 8(a)(2), and Section 302 of the National Labor Relations Act as Amended.

Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) reads as follows:

> "It shall be an unfair labor practice for an employer—
>
> ". . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."

Over the course of the years, the Board has consistently been zealous in prosecuting employers who show favoritism towards one union as against another or have in any way assisted a union in organizing its employees where only one union was involved. Its approach to these situations stems from the foregoing provisions of Section 8(a)(2) of the Act.

In 1961, in *A. O. Smith Corp.*, 132 N.L.R.B. 339, 48 L.R.R.M. 1340, 1343, the Board specifically stated:

> "We agree with the Trial Examiner that this act by the Company (furnishing employees' names and addresses to a Union) constituted illegal assistance."

The Board's ruling in that case was ultimately upheld by the Seventh Circuit, 343 F. 2d 103, 114 (1965). A similar conclusion was reached by the Ninth Circuit in *National Labor Relations Board* v. *L. Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730, 734, in which the Court said:

> "Respondent's furnishing of a list of the names and addresses of its employees to the District Council of Carpenters (AFL) was an illegal act of assistance under § 8(a)(2) of the Act."

To the same accord see—

Hershey Metal Products Co., 76 N.L.R.B. 695, 21 L.R.R.M. 1237 (1948).

Wagner Iron Works, 104 N.L.R.B. 445, 32 L.R.R.M. 1104 (1953).

National Labor Relations Board v. *Wagner Iron Works & Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL)* (C.A. 7), 220 F. 2d 126 (1955).

The effect of the Board's ruling in *Excelsior* and the continuing impact of the foregoing cases appears to place the Board in a completely incongruous dilemma. It is illegal and a violation of Section 8(a)(2) of the Act for an employer voluntarily to assist a labor organization by giving to it the information called for in *Excelsior*. However, if

the Board sees fit to order such information to be given to the union, by some mystical wave of the wand, such information and assistance no longer violate Section 8(a)(2) of the Act. In effect, it is illegal for an employer to give this information on Monday and it is illegal for an employer not to give it on Tuesday.

In amending the National Labor Relations Act of 1947 (Taft-Hartley Act), Congress was seriously concerned about payments made by employers to representatives of their employees or to individuals seeking to obtain a representative position. As a result of this concern, it enacted Section 302 of the Act, which in pertinent part reads as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> "(1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> "(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> . . . . . .
>
> "(b)(1). It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a).
>
> . . . . . .

"(d) Any person who willfully violates any of the provisions of the section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both." (29 U.S.C. § 186.)

From the statutory language it is clear that the giving of a thing of value constitutes a criminal act under Section 302(a), and further that anyone who demands a thing of value from an employer for the use of any representative of his employees or any individual seeking to represent his employees comes in direct conflict with the criminal provisions of the Act (Section 302(b)(1)).

During the investigation of the objections to the conduct of the subject election, the employer categorically stated that the giving of a list of the names and addresses of its employees to the Board, whose sole intention and purpose were to transmit said list both to the Boilermakers and to the Steelworkers, constituted a violation of the foregoing sections of Section 302 (R. 45). At that time the defendants requested the Regional Director to hold a hearing to resolve the issue of whether or not such a list constituted a thing of value. The Regional Director did not find it fit to hold such a hearing and, in effect, completely ignored this request.

When the Board, on December 27, 1966, served a subpoena duces tecum upon the defendants, the defendants then filed a motion to the Board requesting that the subpoena be quashed (Plaintiff's Exhibit H, R. 44). In this motion the defendants again alleged that the list was a thing of value within the meaning of Section 302. Again the defendants requested a hearing to determine whether or not the list constituted the giving of a thing of value, which

request was completely ignored by the Board (Exhibit A, R. 45).

It is, or it certainly should be, common knowledge of which the Court below could take judicial notice that a list of names and addresses of individuals—a mailing list—is a thing of value. Mailing lists are compiled by mail advertising houses and are used for the distribution of mail on behalf of their customers. There are other corporations and businesses who make a very active and successful business of merely compiling such lists and renting or selling them to mail advertising houses (Exhibit D, R. 76-118).

U.S. Representative Clement J. Zablocki, of the 4th District of Wisconsin, has been seriously concerned over the distribution of pornographic literature through the United States mails. Several years ago he submitted a bill in the United States Congress that, in effect, provided that all persons who deal in mailing lists must keep a record of the uses to which these mailing lists were used; if a list were rented or sold, the individual who possessed the list must retain a record of these transactions; and his record would be subject to inspection by the United States Post Office Department (Exhibit C, R. 61-75).

Again, in 1967, in the current session of Congress, Representative Zablocki submitted a substantially similar bill (Exhibit C, R. 73-75). In presenting his bill to Congress, Congressman Zablocki stated on the floor on February 9, 1967:

> "For example, in reviewing mailing list catalogues in my possession, I have found that a list of 918 pedigreed swine breeders can be had for $57.50, a list of 27 deaf missionaries for $8.00 and the names of 24 zwieback manufacturers for $10.50.
>
> "You may be pleased to know, Mr. Chairman, that $10.50 also will buy a list of 84 doughnut bakers living

in your home state of Connecticut. And that a Senator's name and address sells for about 15 cents, while a member of the House is only worth a nickel.

"If one so desires, he can obtain a list of 212,000 attorneys, 99,000 dentists, and 259,000 doctors—all for about $25 per thousand."

While Congressman Zablocki's purpose and intent is the elimination of pornographic literature from the United States mails, it is clear that a mailing list does constitute a "thing of value."

On September 24, 1966, the New Yorker Magazine, published by the New Yorker Corporation, New York City, New York, published an article directly dealing with the commercial nature of such mailing lists (see Exhibit D, R. 76-118).

There have been no Board or Court decisions as to whether or not a list such as the Board seeks here is a "thing of value." The issue is raised for the first time. If it is a thing of value, the action which the Board demands is clearly within the proscription of Section 302. Indeed, a question is raised as to whether the Board and its agents have not already violated Section 302(b).

It is no answer to the defendants' position that the unions would not sell this list. What the unions could or would do with it once it is beyond the employer's control is not a matter of issue before this Court. The sole problem that must be resolved is whether or not the list constitutes a thing of value; and, on this issue, the defendants have twice requested both the Regional Director and the National Labor Relations Board itself to hold a hearing to determine the validity of its purpose, and in each instance the defendants' request has been completely ignored. The

Courts, in construing Section 302, have clearly held that the proscription in Section 302 not only applies to the giving of money, but is applicable to "anything of value," and it is clearly applicable to both the employer and the employees' representatives. *Cf. United States* v. *Roth* (C.A. 2, 1964), 57 L.R.R.M. 2553, cert. den. 58 L.R.R.M. 2591, and its companion case, *United States* v. *Holt* (C.A. 2, 1964), 56 L.R.R.M. 2556. See also *United States* v. *Schabert* (C.A. 2, 1966), 62 L.R.R.M. 2571; *United States* v. *Ricciardi* (C.A. 2, 1966), 61 L.R.R.M. 2477; *United States* v. *Kramer* (C.A. 7, 1966), 61 L.R.R.M. 2234.

The District Court, in its opinion in the instant proceeding (R. 118-124), gave only cursory attention to the question of whether or not a mailing list was a thing of value. In response to an admission during oral argument by counsel for the Board, in which he admitted that a mailing list could be a thing of value, the Court said: "The possible value of such a list as a mailing list gives this contention some surface plausibility" (R. 124). The Court then dismissed this contention with a reference to *Zentner* v. *American Federation of Musicians of United States & Canada &c.* (S.D. N.Y. 1965), 237 F. Supp. 457.

It is submitted that the application of this decision to the present proceedings is inappropriate. The issue involved in *Zentner* was based upon the right of a union to have the names and addresses of all of its members as they traveled around the country in order that it might properly police its collective-bargaining agreements and wage standards.

It can readily be recognized that a union must have the names of its members in order to properly police and administer its own business, but it is submitted that no union is entitled to such information prior to the time when they are the recognized collective bargaining representative of

employees. Further, *Zentner* is inappropriate to the present proceeding.

VI.

The Subpoena, the Subject of This Proceeding, Calls for the Production of Records Exceeding the Board's and the Court's Statutory Authority, and is Not Supported by Section 11 of the Act.

The District Court in the instant proceeding erred in its assertion of jurisdiction under Section 11(2) of the Act (29 U.S.C. § 161(2)). It assumed that the subpoena issued by the Board required the production of testimony or evidence necessary to resolve the question as to whether or not either or both unions represented a majority of the defendants' employees.

The Board's error lies in the fact that the subpoenas here in question did not meet the statutory subpoena requirements as set forth in the Act, and further that the subpoenas were required to produce testimony or evidence necessary to resolve the problem presented to the Board.

The Board's authority to issue subpoenas permits the Board to issue subpoenas "requiring the attendance and testimony of witnesses or the production of any evidence" (29 U.S.C. § 161 (1). See also 29 U.S.C. § 161(2), and 29 U.S.C. § 161(3)). It is submitted that, unless the Board can establish the necessity of the production of evidence or the submission of testimony touching the matter under investigation in order to resolve a factual issue, the District Court is without authority to enforce the Board's subpoena (see *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298; *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F. 2d 450; *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. 2d 692).

The Board has clearly indicated that the sole purpose of requiring the *Excelsior* list is for transmittal of these lists to the union or unions involved in a representation case. Where this is the avowed purpose of requiring the defendants to supply such a list, it is inconceivable that the Board or the Court can find jurisdiction for the production of such lists on the ground that they constitute evidence or testimony.

> "Evidence is a demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the fact or point in issue, either on the one side or on the other. In legal acception, the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 31 C.J.S. "Evidence," § 2.

The gravamen of this situation is that the Board misconstrues its statutory authority under Section 11(2) and misconstrues the type of information to which it is entitled under the provisions of the Act.

In *Excelsior* the Board goes to great length in attempting to equate the right of a stockholder to obtain the names and addresses of fellow stockholders in the corporation. It finds in this area justification for its *Excelsior* decision. It has been acknowledged by the Courts, including the Supreme Court of the United States, that recognition must be given to the Board's "expertize" in matters pertaining to labor management relations. However, the Board's approach and argument, based upon a stockholder relationship, belies any expertize of the Board in the field of corporate law. The reason that an individual stockholder may obtain a list of all stockholders in the corporation is

based primarily upon the fact that a stockholder, no matter how small his holdings, is a partial owner of the corporation and as such has a right, both under common law and under statutory law, to know who his fellow stockholders are and to address them on any matter which he feels is of personal interest to them.

Again, the Board in *Excelsior* seeks sustenance to support its position on the ground that in a national, state or local election a candidate for office may secure the names and addresses of all registered voters. Presumably this is in order that the candidate can address the voters by mail, by telephone, or by personal visits. Going further, the Board again seeks support in the fact that a candidate for a union office is entitled to have the union distribute his personal campaign literature to all members. The Board's argument on both of these two issues is completely naïve and belies an "expertize" of the Board in these areas. The availability of a voters' list in a public election is a statutory right, and the requirement that a candidate for office in a union have a right to have the union distribute his literature for him is a statutory right.

In the present situation, the Board has not and cannot cite any provision in the Act which requires an employer to supply the information here requested by the Board, or indeed permits the Board to request such information.

The Board completely fails to understand or acknowledge the true nature of a subpoena and why subpoenas are necessary and vital. A subpoena has been described in the following language:

> "A 'subpoena' . . . is process, or a writ . . . for the purpose of compelling the attendance of a person whom it is desired to use as a witness . . . A writ which does not cause a witness to . . . give testimony . . . is not a subpoena." 97 C.J.S., "Witnesses" § 20.

"Generally speaking, a subpoena duces tecum may be issued to compel the production of any proper documentary evidence, such as books, papers, documents, accounts and the like, which is desired for the proof of an alleged fact relevant to the issue before the Court or officer issuing the subpoena. . . ." 97 C.J.S., "Witnesses," § 25e.

The Board has not urged and cannot urge upon this Court that the information they are presently seeking comes within the foregoing definition of a subpoena or the purposes for which a subpoena may be issued.

There can be no issue as to the purpose for which the Board seeks the names and addresses of the defendants' employees. It is clearly set forth in Board's Exhibit B (R. 11-13), in the following language:

"An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, on or before Sept. 13, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." *Excelsior Underwear, Inc.*, 156 N.L.R.B. No. 111.

There is no controversy involved which the Board seeks to resolve by its subpoena. There is no information that the Board seeks to obtain to assist the Board in the conduct of the election. As has already been pointed out, the Board's argument in regard to minimizing challenges during the course of the election is, in at least this proceeding, without a foundation in fact. Section 11 of the Act, upon which the Board bases its alleged claim to jurisdiction for itself and for this Court, reads in part as follows:

> "The Board . . . shall at all reasonable times have access to . . . evidence. . . . The Board . . . shall upon application . . . issue . . . subpoenas requiring the attendance and testimony of witnesses or the production of . . . evidence . . ."

Section 11(1) of the Act then discusses the areas in which the Board may properly issue a subpoena. In each instance, however, the right to issue a subpoena is based upon the necessity of the Board's ascertaining "evidence" or the necessity of the "production of evidence before the Board." Section 11(2), which grants District Courts of the United States "jurisdiction" to enforce Board subpoenas, again states emphatically that in the enforcement of such subpoenas the purpose is to afford the Board the right to produce "evidence" or to obtain "testimony."

The list which the Board is seeking here does not come, under any stretch of the imagination, within the terms of evidence or testimony.

The information which the Board solicits cannot aid or assist the Board in the determination of whether or not there is a question affecting interstate commerce. The sole purpose that the Board seeks the *Excelsior* list is to aid and abet the unions in their attempts to seek a representative status of the defendants' employees.

If the Board feels that the *Excelsior* lists are appropriate and necessary to the conduct of an election under the Act, its recourse is to the Congress of the United States and not to the District Courts.

The Board presumes that its request for enforcement of its subpoena, or, in the alternative, its request for the production of an *Excelsior* list, is mandatory upon the District Court. Here again the Board misstates the law. Section 11(2) of the Act merely states that the District Courts—

> "shall have jurisdiction to issue to such person [who has refused to comply with the Board's subpoena] an order requiring such person to appear before the Board, its member, agent, or agency, there to produce *evidence if so ordered,* or there . . . *to give testimony* touching the matter under investigation or in question." (Emphasis added.)

The District Court, the Board assumes, is to be nothing but a rubber stamp that must automatically enforce its subpoena. The Board gives no consideration to the fact that it is seeking an equitable relief. It ignores the fact that, in equity, it is asking the Court to exercise its discretion. While it is the defendants' position that the District Court had no jurisdiction based upon the foregoing statutory language to support the complaint, since neither testimony nor evidence is involved, it is still within the Court's discretion to determine whether or not it should in propriety sustain the Board's request.

The discretionary nature of the District Court's jurisdiction in the instant proceeding has been recognized in other cases involving *Excelsior* by District Courts in the United States.

In the first case to be presented to the Federal judiciary the Board sought, in an action identical with the present

action, to enforce its subpoena, or, in the alternative, to require the employer to submit names and addresses of its employees (*National Labor Relations Board* v. *Hanes Hosiery Div.* (U.S.) D.C. Middle District of North Carolina (Nov. 17, 1966), 63 L.R.R.M. 2513, reversed 66 L.R.R.M. 2264). In rendering his decision, Chief Judge Stanley held that the information which the Board sought in its complaint constituted neither evidence nor testimony, and therefore the Court was without jurisdiction to enforce the request of the Board. In the alternative the Court said:

> "In any event, if the Court has jurisdiction, it appears that the request of the plaintiff is directed to the sound discretion of the Court; and this Court, in the exercise of its discretion, is of the opinion, and so holds, that the subpoena should not be enforced."

In *National Labor Relations Board* v. *Montgomery Ward* (U.S.D.C. Middle District of Florida), 24 L.R.R.M. 2061, the Court came to a similar conclusion; and it specifically stated its agreement with Judge Stanley in the *Hanes* case. Specifically in regard to the question as to whether or not the Board's complaint called for the production of "evidence" or "testimony," the Court said at 2062:

> "I agree with Judge Stanley in the opinion that Section 162 of Title 29 of the United States Code vests this Court only with the authority to enforce a subpoena to produce evidence, or to require testimony, or to require attendance of a witness concerning an investigation or proceeding.
>
> "Now, this is not the purpose of this subpoena. There isn't a thing that the Board plans to do with it in conducting any investigation or any proceeding. All

the Board wants is acting as a conduit in handing it over to the Union, and I think, therefore, that it just does not—is not connected with an effort to secure evidence or testimony of a witness in connection with any matter that is under investigation."

In its conclusion, the Court stated:

"I think that then the matter is in the discretion of the Court and the request for injunctive relief should be and is hereby denied.

"Again, I repeat, this is not a ruling on the validity of the Excelsior Rule, and I specifically make that clear."

There are other cases in which District Courts have come to a different conclusion from the conclusion in the *Hanes* and the *Montgomery Ward* cases. In *National Labor Relations Board* v. *Wolverine Industries Division* (U.S. D.C. Eastern District of Michigan, 64 L.R.R.M. 2060) the Court clearly had a misconceived approach to the rulings of the National Labor Relations Board whereby an employer is proscribed from entering an employee's house to discuss union activities with him. In the course of its discussion of the issues the Court said at 2061:

"Of course, he can't turn his back to the boss if the boss comes to the home. . . ."

As indicated, supra, pp. 17-18, the "boss" is not permitted by the Board to go to the employee's home. The Court erroneously assumed that both the union and the employer had equal rights to visit the employees in their homes and equal rights in regard to promises, threats and coercions.

In other cases in which the *Excelsior* rule has been considered by District Courts, the Courts have assumed two basic principles which are erroneous: (1) that the production of the *Excelsior* list constitutes production of evidence or testimony within the meaning of Section 11(2) of the Act, and (2) that the requirement that an employer produce the names and addresses of his employees is within statutory authority of the Board. It is submitted on the basis of the foregoing that these two assumptions are clearly erroneous. *National Labor Relations Board* v. *Rohlen,* 64 L.R.R.M. 2168, affirmed 66 L.R.R.M. 2481. *Swift & Co.* v. *Solien,* 66 L.R.R.M. 2038. *National Labor Relations Board* v. *Beechnut Lifesavers, Inc.,* 66 L.R.R.M. 2327.

Conclusion.

It is respectfully submitted that this Court should affirm the Court of Appeals in holding the *Excelsior* rule invalid because of the Board's failure to comply with the Administrative Procedure Act, and further that this Court should review the entire case *de novo,* to resolve the issues presented by the extensive litigation as shown in Appendix.

Respectfully submitted,

HERRICK, SMITH, DONALD, FARLEY & KETCHUM,

By QUENTIN O. YOUNG,

Attorney for Respondent.

September 26, 1968.

Appendix.

Case Name Citation	District Court			Court of Appeals		
	For Em.	For N.L.R.B.	Holding	For Em.	For N.L.R.B.	Holding
Wyman-Gordon 65 L.R.R.M. 2763 68 L.R.R.M. 2483		⋈	Administrative Procedure Act inapplicable; Excelsior rule valid; Lists are evidence and within Board's jurisdiction to compel by subpoena	⋈		Excelsior rule invalid under Administrative Procedure Act
Hanes 63 L.R.R.M. 2513 66 L.R.R.M. 2264 384 F. 2d 188 Cert. den. 67 L.R.R.M. 2632 390 U.S. 950	⋈		District Court lacks jurisdiction to enforce subpoena		⋈	Excelsior rule does not violate sec. 9(c); sec. 7; sec. 8(a)(1). The lists are evidence and proper subject of subpoena
Crane Packing Co. 64 N.L.R.B. 2168 66 L.R.R.M. 2481 385 F. 2d 52		⋈	Lists are subject to subpoena powers of the Board despite other means of communication		⋈	Board entitled to subpoena lists since lists constitute "evidence"
Q-T Shirt Co. (Appeal pending) 67 L.R.R.M. 2356 279 F. Supp. 1	⋈		District Court lacks jurisdiction to enforce subpoena since information not necessary to Board election and since act impliedly precludes judicial enforcement in representation proceedings failing an unfair labor practice charge			
Beech-Nut Life Savers, Inc. 66 L.R.R.M. 2327 (Appeal pending) 274 F. Supp. 432	⋈		Excelsior rule valid despite failure to follow Administrative Procedure Act; lists constitute evidence under sec. 11 of Act			
British Auto Parts 64 L.R.R.M. 2641, 2786 (Appeal pending) 374 F. 2d 81 266 F. Supp. 368		⋈	Lists constitute evidence within meaning of Act; Excelsior rule does not violate employees' rights of privacy or interfere with their rights under sec. 7 of the Act; Excelsior rule valid			
Teledyne, Inc. 66 L.R.R.M. 2408 (Appeal pending)		⋈	Excelsior rule is valid; for reasonable exercise of Board's power, lists are subject to subpoena and enforcement by District Court			
Howell Refining Co. 69 L.R.R.M. 2032		⋈	Employer having supplied list may not challenge Excelsior rule; Court declined to follow Wyman-Gordon decision			
Duncan Foundry and Machine Works 67 L.R.R.M. 2515 67 L.R.R.M. 2516		⋈	Excelsior list subject to the subpoena powers of the Board under sec. 11(2) of the Act		⋈	Stay of District Court Order vacated
Wolverine Industries Division, Mid-State Metal Products, Inc. —Fed. Supp.— 64 L.R.R.M. 2187		⋈	Excelsior list constitutes evidence under sec. 11 of the Act			
Montgomery Ward & Co.	⋈		Excelsior list does not constitute			

CRANE PACKING Co. 64 N.L.R.B. 2168 66 L.R.R.M. 2481 385 F. 2d 52		X	Lists are subject to subpoena powers of the Board despite other means of communication		X	Board entitled to subpoena lists since lists constitute "evidence"
Q-T SHIRT Co. (Appeal pending) 67 L.R.R.M. 2356 279 F. Supp. 1	X		District Court lacks jurisdiction to enforce subpoena since information not necessary to Board election and since act impliedly precludes judicial enforcement in representation proceedings failing an unfair labor practice charge.			
BEECH-NUT LIFE SAVERS, INC. 66 L.R.R.M. 2327 (Appeal pending) 274 F. Supp. 432	X		Excelsior rule valid despite failure to follow Administrative Procedure Act; lists constitute evidence under sec. 11 of Act			
BRITISH AUTO PARTS 64 L.R.R.M. 2641, 2786 (Appeal pending) 374 F. 2d 81 266 F. Supp. 368		X	Lists constitute evidence within meaning of Act; Excelsior rule does not violate employees' rights of privacy or interfere with .their rights under sec. 7 of the Act; Excelsior rule valid			
TELEDYNE, INC. 66 L.R.R.M. 2408 (Appeal pending)		X	Excelsior rule is valid; for reasonable exercise of Board's power, lists are subject to subpoena and enforcement by District Court			
HOWELL REFINING Co. 69 L.R.R.M. 2032		X	Employer having supplied list may not challenge Excelsior rule; Court declined to follow Wyman-Gordon decision			
DUNCAN FOUNDRY AND MACHINE WORKS 67 L.R.R.M. 2515 67 L.R.R.M. 2516		X	Excelsior list subject to the subpoena powers of the Board under sec. 11(2) of the Act		X	Stay of District Court Order vacated
LVERINE INDUSTRIES DIVISION, MID-STATE METAL PRODUCTS, INC. —Fed. Supp.— 64 L.R.R.M. 2187		X	Excelsior list constitutes evidence under sec. 11 of the Act			
MONTGOMERY WARD & Co. —Fed. Supp.— 64 L.R.R.M. 2299	X		Excelsior list does not constitute evidence under sec. 11 of the Act			
SWIFT & Co. v. SOLIEN 66 L.R.R.M. 2038		X	Employer having consented to election may not obtain an injunction restraining Regional Director from holding election; Excelsior list is evidence under sec. 11 of the Act			
GROYNDIKE TRANSPORTATION INC. v. DAVIS	X		Excelsior rule invalid since adopted in violation of sec. 6 of the Act and in violation of the Administrative Procedure Act			
MAGNESIUM CASTING Co. v. HOBAN 68 L.R.R.M. 2765 —Fed. 2d—	X		District Court may enjoin Regional Director from certifying results of election where employer submitted an Excelsior list since Excelsior rule invalid under the Administrative Procedure Act		X	Employer having submitted Excelsior list waives right to object to Excelsior rule

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 463

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WYMAN-GORDON COMPANY

No. 578

WYMAN-GORDON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION AND CROSS-PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Company has filed a brief in response to the Board's petition for certiorari in No. 463, and a cross-petition of its own, No. 578. In its brief the Company, although contending that the court of appeals correctly held that the Board's *Excelsior* requirement

was promulgated in violation of the formal rule-making procedures of the Administrative Procedure Act, acknowledges that that issue, and the subsidiary issue whether the Board can compel compliance with that requirement through a subpoena enforcement or other judicial proceeding, warrant resolution by this Court. Thus, the Company apparently does not oppose the Board's petition.

In its cross-petition the Company urges that the Court also should review the substantive validity of the *Excelsior* requirement. But there is no need to grant the cross-petition to resolve that issue. The court of appeals did not decide the question; and the Company may argue in No. 463, as an alternative ground for upholding the judgment of the court of appeals, that the *Excelsior* requirement is invalid. Indeed, the cross-petition is untimely: it was filed on September 27, 1968, 107 days after the court of appeals entered its judgment on June 12, 1968 (Pet. No. 463, App. B, p. 13a), and no extension of time for filing was obtained.

The petition in No. 463 should be granted, and the cross-petition in No. 578 should be denied.

Respectfully submitted.

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National Labor Relations Board.

OCTOBER 1968.

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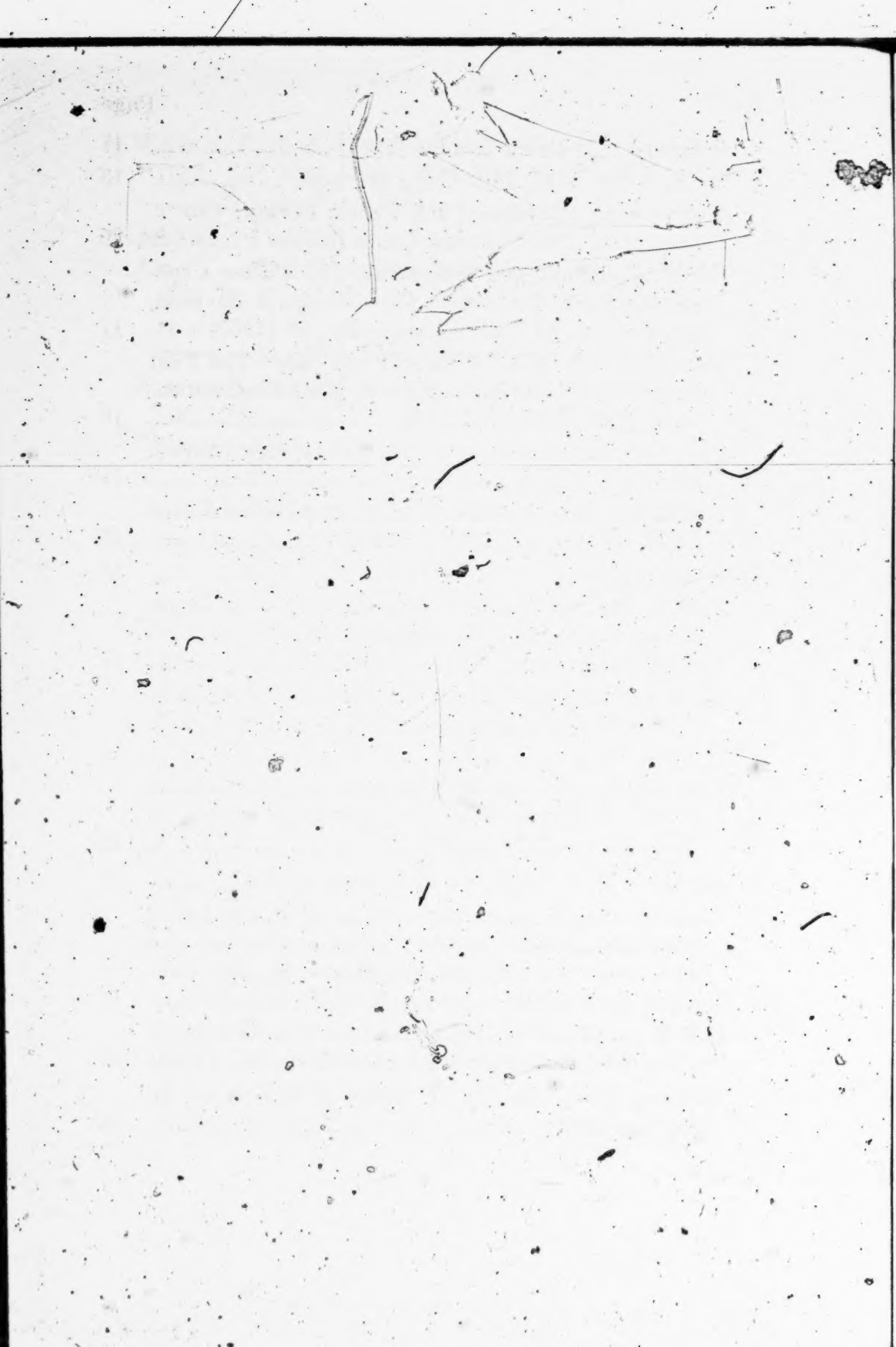

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 463

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

WYMAN-GORDON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the Petitioner's position, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 122 national and international labor unions having a total membership of approximately 12,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinion below, jurisdictional statement, questions presented, and the statutory provision involved are set out at pp. 1-2 of Petitioner's brief.

INTEREST OF THE AFL-CIO

The court below, while stating (A. 110-111) that it was not "greatly impressed by the arguments challenging" the validity of the rule announced by the National Labor Relations Board in *Excelsior Underwear Inc.*, 156 NLRB 1235

(1966) which requires employers to furnish the Board, and all parties to a representation election, with a list of the names and addresses of the employees eligible to vote in the election, held (A. 111-114) that the rule was invalid because it was enunciated in an adjudicatory rather than in a formal rule-making proceeding. The Board filed a petition for certiorari challenging this holding, No. 463 this term, and the Wyman-Gordon Co. filed a cross petition challenging the rule itself, No. 578 this term. The Board then filed a Memorandum stating (p. 2) that "there is no need to grant the cross petition . . . which is untimely . . . [to] review the substantive validity of the *Excelsior* requirement . . . [for] the Company may argue in No. 463, as an alternative ground for upholding the judgment of the court of appeals, that the *Excelsior* requirement is invalid." On November 12, 1968 the Board's petition was granted and Wyman-Gordon's was denied, 393 U.S. ....., 37 Law Week 3177.

Because it promises more effective union access to employees, employers have attacked the *Excelsior* rule on a wide front. As a result four courts of appeals, other than the court below, have passed on its substantive validity, *National Labor Relations Board* v. *Haynes Hosiery*, 384 F.2d 188 (C.A. 4th Cir., 1967), *certiorari denied* 390 U.S. 950; *National Labor Relations Board* v. *Rohlen*, 385 F.2d 52 (C.A. 7th Cir., 1967), *National Labor Relations Board* v. *Beech-Nut Life Savers*, ... F.2d ....., 69 LRRM 2846 (C.A. 2nd Cir., 1968); *British Auto Parts* v. *National Labor Relations Board*, ... F.2d ....., (C.A. 9th Cir., No. 21883, Dec. 17, 1968). Thus this substantive issue is clearly before the Court and it is ripe for adjudication. Certainly, in view of the amount of litigation which has attended *Excelsior*, every consideration of judicial administration calls for a decision on both the substantive and procedural issues posed even though the court below did not reach the former. Since the Board will cover the procedural issue fully, and because of the importance of the substantive issue to the labor movement, the burden of the Federation's brief will

be directed to demonstrating that the *Excelsior* rule is proper and to suggesting a rationale to support its affirmance.

SUMMARY OF ARGUMENT

In *Excelsior Underwear Inc.* 156 NLRB 1235 (1966) (A. 12-28), the National Labor Relations Board ruled that employers must furnish the Board, and all parties to a representation election, with a list of the names and addresses of the employees eligible to vote in the election. The National Labor Relations Act guarantees employees the right "fully and freely to discuss and be informed concerning" the opportunity to organize and the "correlative . . . right . . . of union[s] . . . to inform employee[s]" about this subject, *Thomas* v. *Collins*, 323 U.S. 516, 533-534 (1945). The *Excelsior* rule is so clearly the minimal necessary step to give substance to these rights that there can be no doubt that this Court should reject Respondent's substantive and procedural challenges to it.

1. A campaign to organize a union is a contest between labor and management over the form of the social system that will govern the industrial society of a plant. Since effective union organization can best be promoted by trained persons who devote their full time and knowledge to this task, the union's most effective voice in these contests is the professional organizer. The organizers' main efforts are normally directed to establishing personal contact with the group he seeks to influence, since both union experience and scholarly studies of all types of election campaigns have demonstrated that the single most important factor in determining the choice of the majority of voters is direct personal contact.

Prior to the passage of the Act, the legal and practical problems posed for organizers in their effort to make contact with employees were of extraordinary dimensions. For employers with an anti-union animus, and state and local officials sympathetic to them, have recognized that the

"necessities of the situation" *National Labor Relations Act* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), fuel organizational drives and that the building of a successful union threatens their power and perquisites. Their reaction has been and continues to be widespread active and stubborn resistance to the right to organize. Aside from the use of threats and coercion, the most prevalent legal device used in these campaigns is to inhibit organized labor's access to employees in order to insulate them from the union movement's message, *see, e.g., Thomas* v. *Collins, supra*, 323 U.S. 516; *Hague* v. *CIO*, 307 U.S. 496 (1939); *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949).

The effects of these legal restrictions were, and continue to be, intensified by the practical problems of establishing personal contact with workers in modern America. Public walkways in front of a plant may not suffice because an ever higher percentage of employees drive to work and park within the plant. And if contact cannot be made at the vicinity of the plant the problems become nearly insurmountable, for the sub-group sought to be reached, the workers of a particular plant, melds into the general population. Prior to *Excelsior*, their "names and addresses [were not] readily available" (A. 19). Without this information house to house solicitation is prohibitively expensive in terms of results per dollar and man hour.

2. Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection." Section 8(a)(1) implements this guarantee by interdicting interference, restraint or coercion of employees in the exercise of their Section 7 rights.

Given the nature of these "guarantees of national law" *Thomas* v. *Collins, supra*, 323 U.S. at 533-534, this Court has struck down a variety of state and local efforts to impede access by unions to employees on the streets and in the

parks and other similar public places. Surprisingly enough, however, in light of the fact that the main purpose of the Act was to free self-organization from employer restrictions, the law governing employer impediments to free access of organizers to employees developed under the Act has not kept pace with the First Amendment developments. Indeed prior to the *Excelsior* decision, which was rendered thirty years after the passage of the Act, the employer's power to thwart union access to employees during organizing campaigns remained unimpared. For the employer's basic power in this regard rests in his control of the plant property and of the list of his employees' names and addresses. And neither of these citadels had been breached prior to *Excelsior*, despite the fact that "apart from the suppressors of outright dishonesty, no regulatory principle has received wider application in the field of elections than the notion that each side should be given substantial access to the voters," since "the opportunity to reach *all* the [voters] is basic to a fair and informed election," Bok, *The Regulation of Campaign Tactics In Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 92, 99-100 (1964) (emphasis added).

The forum to which unions have traditionally sought access, through the Act, is the plant, the natural and appropriate site at which to make contact with all the employees with a minimum of difficulty and expense, *see, National Labor Relations Board* v. *United Aircraft Corp.*, 324 F.2d 128, 130 (C.A. 2nd Cir., 1963), *certiorari denied* 376 U.S. 851. In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (1945), this Court approved Board rulings that an employer could not, consistent with the Act, prevent employees from soliciting for the union or distributing union handbills during non-working time and in non-working areas of the plant. However, in *Babcock & Wilcox*, 351 U.S. 105 (1956), where the Board had ruled that non-employee organizers, as well as employees, could

distribute union literature during non-working time in non-working areas of the plant, this Court held, *Id.* at 112:

> "It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit."

Thus the plant was closed to the "correlative . . . right . . . of union[s] . . . to inform employee[s]" concerning unionization. There are three basic flaws in the *Babcock & Wilcox* rule. First, *Babcock & Wilcox,* acknowledging the value of contacts between employees and professional organizers, promises a measure of flexibility in the regulation of access to the plant. However, the lower courts have concluded on the basis of the facts found in *Babcock & Wilcox* that a showing of greater expense or formidable practical difficulty is insufficient and that only impossibility will suffice. Thus in the normal organizing campaign *Babcock & Wilcox* has resulted in total subordination of the right of employees to be fully and freely informed concerning unionization at the plant, and of the correlative right of unions to inform them, to the employer's interests.

Second, this result was not arrived at through an inquiry into the balance to be struck between the substantial employer and employee interests at stake. Indeed, it could not have been arrived at in this manner without reconsidering the rationale of *Republic Aviation,* a step that *Babcock & Wilcox* did not even purport to take. For *Republic Aviation* recognizes that, absent special circumstances, union activity in non-working areas of the plant is compatible with the employer's interest in efficient production and discipline. Thus the employer interest protected by *Babcock & Wilcox* is his bare claim to an absolute right to dominion

over his property, a right claimed simply to prevent his employees from hearing and heeding a union message and possibly organizing to his detriment, *cf.*, *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 324-325 (1968).

Third, quite apart from its substantive nature and effect, the *Babcock & Wilcox* rule is unsound because it has proved impossible to administer in a rational manner. Assuming that the Board had world enough and time, it is most unlikely that it could apply the *Babcock & Wilcox* rule to particular cases in a satisfactory and predictable manner. For a serious effort to grapple with the task set out in *Babcock & Wilcox* requires the Board to balance a "complex of variables" which include a host of unruly "incommensurable quantities," *Case Note: Excelsior Underwear Inc.*, 80 Harv. L. Rev. 459, 462 (1966). Moreover the Board does not have an infinite amount of time to engage in an abstract logical exercise. Its function is to develop and apply manageable rules to govern the fast moving events of an election campaign. Thus *Babcock & Wilcox* is open to criticism on practical grounds since the regulatory context calls for clear rules rather than imprecise standards which are "an invitation to litigation and casuistry" *United Aircraft, supra*, 324 F.2d at 130.

3. In light of the above it is plain that there is no merit in the proposition, advanced by Respondent, that the scope of the *Babcock & Wilcox* rule should be enlarged and that it should become a rule of general application. Nor, we submit, is it desirable to do no more than limit *Babcock & Wilcox* to property cases involving non-employee organizers. Such a course of action would merely be a stop-gap that would leave the Board without a reasoned standard to guide it. What is necessary instead is a return to the approach foreshadowed by *Thomas* v. *Collins*, an approach which builds upon the recognition that the Act intended to put an end to unjustified impediments, erected by either employers or the states, to free access by organizers to

employees. For only such an approach provides the principled basis for the development of the law in this area required for rational administration of the Act.

In *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1948) this Court stated that the "liberty of circulating is as essential to freedom [of speech] as liberty of publishing, indeed, without the circulation the publishing would be of little value, *Ex Parte Jackson*, 96 U.S. 727, 733." Thus methods of communication as well as the content of the communication are entitled to the protections of the First Amendment. The standard governing the circulation of views is that enunciated in *Schneider* v. *State*, 308 U.S. at 161 (1939):

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. . . . In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

Since the freedom to circulate views enjoys the same high place in the gamut of values established by the Act that it does in the Constitutional scheme, *see, Thomas* v. *Collins*, *supra*, 323 U.S. at 533-534, it is natural and appropriate for the Board in assessing employer impediments to the enjoyment of the "full freedom to discuss and be informed concerning" unionization to be guided by the balance struck in *Schneider*. For there is no possible policy consideration which justifies according a higher value to employer interests in conflict with free and untrammeled access to employees than is accorded to the conflicting interests of state and local governments.

Schneider and the cases following it do not simply establish the governing standard; they also set the weight to be given to the competing interests which must be considered

in determining whether unions are to have access to the plant and access to a list of the employees' names and addresses. First, *Schneider* itself demonstrates that the right to circulate views at an appropriate place cannot be barred by an appeal to the argument that other places remain open for their expression. Since the thrust of the First Amendment is to maximize communication, the law simply distinguishes between appropriate and inappropriate locations for public speech; it does not seek to restrict publishers to a single site that the courts or the states believe to be ideal, necessary or most appropriate. Within these wide limits it is for the individuals involved to determine how best to propagate their message. Thus *Schneider* highlights the basic defect in the *Babcock & Wilcox* rule. Where interference with the right to circulate views is shown, it is for the State, or the employer, to justify the abridgment, not for the speaker to justify his right to inform, for the principles underlying the First Amendment, and the Act, are his justification.

Second, as this Court stated in *Martin* v. *Struthers*, 319 U.S. 141 (1943), the right to circulate views at an appropriate place cannot be barred by an appeal to the argument that group, rather than individual, notions of the right to privacy, control, and that it is for the State, rather than the individual, to decide whether he shall be free to hear what he wishes to hear. Thus *Martin* v. *Struthers* demonstrates that free access can not be stifled by group decision, even where the individuals to be approached are voting members of the group. It is a *fortiori*, then, that the employer, who has his own interests to consider, interests which are often separate from and to a marked degree antagonistic to those of his employees, can not speak for them.

In sum, we suggest that in weighing competing interests when dealing with employer impediments to the right of employees "fully and freely to discuss and be informed concerning" unionization, and the "corrective . . . right . . .

of union[s] . . . to inform employee[s]" about this subject, the Board should be guided by the *Schneider* standard and by the concrete applications of that standard in *Schneider* itself and in *Martin* v. *Struthers*.

ARGUMENT

THE EXCELSIOR RULE SHOULD BE AFFIRMED SINCE IT IS THE MINIMAL NECESSARY STEP REQUIRED TO GIVE SUBSTANCE TO THE RIGHT OF EMPLOYEES GUARANTEED BY THE NLRA TO DISCUSS AND BE INFORMED CONCERNING UNIONIZATION AND TO THE CORRELATIVE RIGHT OF UNIONS TO INFORM EMPLOYEES ABOUT THIS SUBJECT

In *Excelsior Underwear Inc.*, 156 NLRB 1235 (1966) (A.12-28) the National Labor Relations Board ruled that employers must furnish the Board, and all parties to a representation election, with a list of the names and addresses of the employees eligible to vote in the election. The instant case is here because the Respondent, recognizing that *Excelsior* would allow unions more effective access to employees, has followed the classic pattern of employer resistance to free communication between labor organizations and employees by refusing to comply with the *Excelsior* rule and has sought to overturn it on both substantive and procedural grounds.

In *Excelsior* the Board reasoned (A. 18-19, 20-21):

> "Among the factors that undoubtedly tend to impede a reasoned choice [in a representation election] is a lack of information with respect to one of the choices available . . . [A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed . . .
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> "[W]ithout a list of employee names and addresses, a labor organization, . . . has no method by which it can

be certain of reaching all the employees with its arguments in favor of representation, and, as a result employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters. In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation."

* * *

"A requirement that all participants in an election contest have the opportunity to ascertain the names and addresses of the voters is not uncommon. Lists of registered voters in public elections are open to inspection and copying by the public. When stockholders wish to participate in election contests (or other proxy contests), management either must provide them with the names and addresses of other stockholders or mail campaign material for them. Any candidate for union office is entitled to have the union distribute his campaign literature to all members."

"We see no reason why similar opportunities should not be available in a representation election. As [Dean Bok of Harvard] has stated, "Since the opportunity for both sides to reach all the employees is basic to a fair and informed election, the reasons for requiring disclosure seem just as strong as those leading to similar requirements under other provisions of the law." (Emphasis in original, footnotes omitted)

The National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq*, guarantees employees the right "fully and freely to discuss and be informed concerning" the opportunity to organize and the "correlative . . . right . . . of union[s] . . . to inform employee[s]" about this subject *Thomas* v. *Collins*, 323 U.S. 516, 533, 534 (1945). The *Excelsior* rule is so clearly the

minimal necessary step to give substance to these rights that there can be no doubt that it should be affirmed by this Court. The major arguments against the rule, presented by employers, serve only to emphasize the lack of principled objections to it. Thus the employer, both in the instant case and in *Excelsior*, argued that the Board's rule invaded his privacy rights and those of employees. The Board correctly rejected this argument, stating (A. 22-23):

> "A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election."
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> "By compelling the employer to provide the union with information that the employees have chosen not to divulge, the Board, it is asserted, compels employer interference with the Section 7 right of employees to refrain from union activities. We regard this argument as without merit. An employee's failure to provide a union with his name and address, whether due to inertia, fear of employer reprisal, or an initial predisposition to vote against union representation, is not, as we view it, an exercise of the Section 7 right to refrain from union activity. Rather, in the context with which we are here concerned—a Board-conducted representation election—an employee exercises this right by voting for or against union representation."

In addition, both in the instant case and in *Excelsior*, the employer has argued that in light of this Court's decision in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and *National Labor Relations Board* v. *United Steelworkers (Nu-Tone Inc.)* 357 U.S. 357

(1958), the Board should require employers to provide names and addresses only in those situations in which all alternative channels of communication are closed to the union.

The *Babcock & Wilcox* rule on alternative channels of communication cuts against the full enjoyment of the basic right of employees to "fully and freely . . . . discuss and be informed concerning" unionization and of the "correlative right . . . of union[s] . . . to inform employee[s]" about this subject. It is thus our view that it should not be read as applying to the period of time after a representation election has been directed. As the Board noted (A.24-25):

> "We think that the issue presented by these cases is distinguishable from that presented in *Babcock* or *Nutone* and that, even assuming the availability of other avenues by which a union *might* be able to communicate with employees, we may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election. . . . [A]ssuming that there is some legitimate employer interest in non-disclosure, we think it relevant that the subordination of that interest which we here require is limited to a situation in which employee interests in self-organization are shown to be substantial. For, whenever an election is directed (the pre-condition to disclosure) the Regional Director has found that a real question concerning representation exists; when the employer consents to an election, he has impliedly admitted this fact. The opportunity to communicate on company premises sought in *Babcock* and *Nutone* was not limited to the situation in which employee organizational interests were substantial, i.e., in which an election had been directed." (Emphasis in original, footnote omitted)

Since a union is required to show that at least 30% of the employees in the unit in question desire an election, Section 9(c)(1) of the Act, Sec. 101.18 Rules and Regulations and Statments of Procedure of the National Labor Relations Board, 29 C.F.R. 101.18, and since an election

loss forecloses the union for a year, Section 9 (c)(3), it can hardly be argued that such a construction of *Babcock & Wilcox* would open the employer to undue intrusions upon his interests. And it is beyond question that the critical period immediately prior to an election is one during which it is especially appropriate to foster and protect "the opportunity for both sides to reach all the employees" (A.21), *cf., Mills* v. *Alabama,* 384 U.S. 214 (1966). The employer's opportunity to reach all his employees is assured under present Board law since he has the right to assemble his employees on paid time to impart his views to them in a captive audience speech without according the union the right of reply *Livingston Shirt Corp.* 107 NLRB 400 (1953); *cf., National Labor Relations Board* v. *Virginia Electric Power Co.,* 314 U.S. 469 (1941). Employers recognizing the value of this technique take full advantage of their rights. In 1965 the Federation conducted a survey of its regional directors and organizers in order to elicit information concerning the 780 representation elections throughout the country in which they participated during 1964. The results of this survey were presented to the Board for its consideration in the *Excelsior* case, and the summary of the findings prepared for the Board are attached as an Appendix to this brief. This survey showed that in 73% of these elections employers made captive audience speeches. Against this background, the reading of *Babcock & Wilcox* we suggest is most certainly warranted. Indeed, as we shall now show, when the right of employees to have free access to organized labor's message unhindered by their employers or state and local authorities is considered in its entirety, it is fair to say, paraphrasing Mr. Justice Frankfurter, that *Babcock & Wilcox* is "a derelict on the waters of the law" *Lambert* v. *California* 355 U.S. 225, 232 (1957, Frankfurter J. dissenting) which should be removed by the Court at this time.

1. A campaign to organize a union is a contest between labor and management over the form of the social system

that will govern the industrial society of a plant. In 98% of these campaigns, if that contest can not be settled by the immediate parties and has to go to the Board, the agency that Congress has established to determine the outcome, the result will be determined in a representation election.[1] Since effective union organization can best be promoted by trained persons who devote their full time and knowledge to this task, *cf.*, H.Rep. No. 1147, 74th Cong. 1st Sess. p. 10., the union's most effective voice in these contests is the professional organizer. The organizer is essential because he is experienced in organizing techniques, familiar with the complexities of modern labor law and labor relations, and invulnerable to the discriminatory discharge which all too frequently befalls employees active in a campaign,[2] *see,* Miller, Problems of Labor, 88-96, 108, 121 (1951), U.S. Dept. of Labor, B.L.S. Bulletin No. 1000, *Brief History of the American Labor Movement,* 44-47 (1950).

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[1] "In fiscal 1967, the Board conducted 8,116 elections, as opposed to 157 cases in which union majorities were established by cards apart from elections (approximately 1.9 percent of the elections conducted). Of these 157 cases, all but 16 involved situations in which a fair election was made impossible or was invalidated by employer unfair labor practices." Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers, Committee on the Judiciary, United States Senate, 69 LRR 157, 165 (1968).

[2] "Violations of Sections 8(a)(3) and 8(b)(2) are, despite 33 years of industrial experience with the law, still the largest single source of all unfair labor practices, and over the years the percentage of such cases has not changed radically. In Fiscal Year 1967, for example, two out of three charges filed against employers —totaling 7,463 charges—alleged discrimination or discharge in violation of the Act. . . . In the labor relations milieu of the late 1960's, seniority rights, health insurance, pension credits and other job-related protections have become commonplace both in organized and unorganized enterprises. The loss of such protections, as a result of illegal discrimination, might destroy the expectations of a lifetime of employment." McCulloch, *New Remedies Under the National Labor Relations Act,* 68 LRR 60, 63 (1968).

The organizer's main efforts are normally directed to establishing personal contact with the group he seeks to influence, since both union experience and scholarly studies of all types of election campaigns have demonstrated that the single most important factor in determining the choice of the majority of voters is direct personal contact. As Professors Katz and Lazarsfeld observed in summing up the findings of their classic study of the 1940 presidential election campaign:

> "The one source of influence that seemed to be far ahead of all others in determining the way people made up their minds was personal influence." Katz and Lazarsfeld, Personal Influence: The Part Played by People in the Flow of Mass Communications, 32 (1955).

The experience on the national level is mirrored in local elections. Professors Eldersveld and Dodge compared the respective weights of the written and spoken word in swaying voters and reported:

> "The Ann Arbor data showed the greater effectiveness of a personal interview over sending literature through the mails. . . . The Erie County study also demonstrated the potentiality of personal contact as a source of influence, particularly with regard to those persons who were generally untouched by the mass media." Eldersveld and Dodge, *Personal Contact or Mail Propaganda?; An Experiment in Voting Turnout and Attitude Change,* in Katz et al., eds., Public Opinion and Propaganda 532, 541 (1954).[3]

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[3] Further documentation of the importance of personal influence is provided in Berelson, Lazarsfeld, and McPhee, Voting, ix, 93-114, 115 (1954) ("the influences to which voters are most susceptible are opinions of trusted people expressed to one another"); Campbell, Gurin, and Miller, The Voter Decides, 199 (1954) ("Students of political behavior have long been aware of the vital role that interpersonal forces play in shaping an individual's political attitudes"); Wallace, First Tuesday: A Study of Rationality in Voting, 247 (1964) (confirming that attitude formation "takes place primarily through social *interaction* with people who are *significant* to the individual").

Professor V. O. Key of Harvard, in his highly regarded study of practical politics in the United States, also emphasizes the critical human element:

> "Given the bearing of the personal qualities of the candidate on electoral decision, the outcome of an election may be determined by the image of the candidate implanted in the minds of the voters." Key, Politics, Parties, and Pressure Groups 513-14 (4th ed. 1958).

Key maintains that even in an age of electronic communication, proper presentation of a candidate requires personal contact with the voters, and he emphasizes the added impact provided by a mass meeting:

> "The radio and TV are no substitute for the old-fashioned political rally where the candidate can be seen and heard. . . . The psychological evidence indicates that individuals in crowds are rendered suggestible. The applause picks up the doubters in the audience and carries them along." (*Id.* at 527.)

All this has direct relevance to the representation campaign. What the candidate and the precinct workers do in personifying their party in the civic election, the organizer and his assistants do, and more, for their union. Professors Karsh, Seidman, and Lilienthal comment:

> "The union, to workers in an isolated small town [we would add: to workers in any unorganized milieu], is an abstraction, of which the organizer is the only tangible embodiment. . . . Therefore his personality becomes important, for he sells himself along with, and perhaps as much as, his union; he must inspire confidence and be the kind of person the workers admire and like to be friendly with." Karsh, Seidman, and Lilienthal, *The Union Organizer and His Tactics: A Case Study*, in Barbash, ed., Unions and Union Leadership 83, 94-95 (1959). *See, also*, Ginzberg, The Labor Leader, 92, 98, 103-04 (1948); Perkel, *The Failure of Communication in an Organizing Campaign*, 80 Monthly Lab. Rev. 1200, 1201 (1957), *cf.* Barbash, *The Practice of Unionism*, 39 ff. (1956).

AFL-CIO field men agree wholeheartedly on the importance of personal contact. Many add that the force of personal contact may be intensified by the force of mass psychology. In the 1965 survey the Federation conducted referred to above, the AFL-CIO's twenty-one regional directors supplied such reasons as these:

> "Obviously nothing is as effective as the face-to-face opportunity to address the workers and present the union's program and issues, as well as to rebut the company's statements in its previous captive audience speech. Opportunity for questions and answers is a vital ingredient not present in letters or leaflets."
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> "What is spoken and how it is said can carry more weight than written statements."
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> "Union organizing is group action. When employers score with the whole group, union strength is effectively undermined, and individual contacts can rarely repair the damage."

Prior to the passage of the Act, the legal and practical problems posed for organizers in their effort to make contact with employees were of extraordinary dimensions. For as first recognized and stated by this Court in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921) and as restated in *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), organization has an inherent appeal for working men and women:

> "Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary

and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer."

Employers with an anti-union animus, and state and local officials sympathetic to them, have also recognized that the "necessities of the situation" fuel organizational drives and that the building of a successful union works a peaceful revolution which overturns the status quo and threatens their power and perquisites. Their reaction has been and continues to be wide-spread, active, and stubborn resistance to the right to organize. Aside from the use of threats and coercion, the most prevalent device used in these campaigns is to inhibit organized labor's access to employees in order to insulate them from the union movement's message. A variety of strategies have been employed in the attempt to thwart union communication. Prior restraints through licensing laws have been employed to seal off entire states from union organizers, *see, Hill* v. *Florida*, 325 U.S. 538 (1944), *Thomas* v. *Collins, supra*, 323 U.S. 516. The streets, parks, and meeting halls of large industrial cities have been closed to union solicitations and handbills, *see, Hague* v. *CIO*, 307 U.S. 496 (1939); *cf., Schneider* v. *State (Snyder* v. *Milwaukee)*, 308 U.S. 147, 155 (1939). Company towns have been declared off-limits to unions, *see, National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949). Door-to-door solicitation has been barred, *see, Staub* v. *Baxley*, 355 U.S. 313 (1958). Privately owned streets open to the public at large have been closed to those who wish to spread the union's views, *see, Marshall Field & Co.* 98 NLRB 88, *enforced as modified* 200 F.2d 375 (C.A. 7th Cir., 1953); *cf., Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968). Employees have been prevented from discussing unionism at the work site during their off-time, *see, Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (1945). And outside organizers who seek to spur organization have been refused access to the plant they seek to

organize, *National Labor Relations Board* v. *Babcock & Wilcox Co., supra,* 351 U.S. 105.

The effects of these legal restrictions were, and continue to be, intensified by the practical problems of establishing personal contact with workers in modern America. Even when there are public walkways in front of a plant which are open to solicitation, this point of contact may not suffice because an ever higher percentage of employees drive to work and park within the plant, *see, Babcock & Wilcox, supra,* 351 U.S. at 106-107. And if contact cannot be made at the vicinity of the plant the problems become nearly insurmountable, for the sub-group sought to be reached, the workers of a particular plant, melds into the general population. As the Board has recognized (A. 19) their "names and addresses [are not] readily available from sources other than the employer."

In the AFL-CIO survey referred to above, the nineteen regional directors supplying data on this point estimated that the amount of time spent securing names and addresses ranged from a low of 15% to a high of 55-60%, with two directors simply stating that the effort "never stops" or is "constant." The consensus was that approximately 30% or more of the campaign had to be spent compiling names and addresses. Moreover, the average figure supplied by the directors for the "approximate percentage of names and addresses obtainable through the usual organizing methods" was between 50 and 55%. One regional director in the South, however, commented that it was "practically impossible to secure names and addresses because most workers are known by first names only or by a nickname, and addresses are unknown." Without such information, house to house solicitation is prohibitively expensive in terms of results per dollar and man-hour, since the union as opposed to religious, charitable, or political organizations is interested in reaching only the unorganized worker rather than the population at large. Indeed, even under the best of circumstances, as pro-

fessional fund raisers have discovered, while it is more satisfactory than no personal contact at all "most house-to-house canvassing is relatively sterile" when compared to solicitation in a group context, Seymore, Designs for Fund Raising, 76 (1966).

Finally it is unlikely that union meetings at a public or union hall will be adequate to establish contact with all the employees involved, especially those who have not had any prior contact with organized labor's message. Sebastian de Grazia, in his 20th Century Fund Study on work and leisure in this country, concluded that the average worker has only one hour of free time a day.[4] To expect the union meeting to win an appreciable number of the undecided away from recreational activity is literally to expect the impossible. And of course urban sprawl and congestion intensifies all of these problems.

2. Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection." Section 8(a)(1) implements this guarantee by interdicting interference, restraint or coercion of employees in the exercise of their Section 7 rights. And Section 9, which governs representation elections, empowers the Board to prescribe

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[4] de Grazia, Of Time, Work & Leisure, 96 (1962): "Work time, if we use the calculations made earlier, take up an average of ten hours and 40 minutes a day (job about 8 hours, journey to work 1½ hours, sphere of woman's work in housekeeping allocated for man, about 20 minutes, do-it-yourself work, about 40 minutes, moonlighting, 10 minutes), subsistence time takes up an average of 10½ hours (sleep 8½, dressing, eating, cooking and shopping nearly 2 hours) (Table 3). For all the rest, including prayers, getting the car fixed, going to barber, dentist, shoemaker or laundry—items which are usually overlooked—we can make a low guess of 20 minutes per day. . . . If, in order to give the worker the benefit of the week end, we calculate on the basis of a 5 day week, we shall have to say the job alone takes an average of nearly 9½ hours a day. On work days he would have not 2½ hours of time free but only about one hour."

rules that are consistent with "the whole philosophy of democratic institutions," *National Labor Relations Board v. A. J. Tower Co.*, 329 U.S. 324, 330 (1964).

In *Hague v. CIO, supra*, 307 U.S. at 512, Mr. Justice Roberts stated that "it is clear that the right peaceably to assemble and to discuss . . . the provisions of the National Labor Relations Act and of the opportunities and advantages offered by it . . . and to communicate respecting them whether orally or in writing is a privilege inherent in citizenship of the United States." And in *Thomas v. Collins, supra*, 323 U.S. at 533-534, this Court, while holding that Texas had unconstitutionally interfered with the right of Thomas, the president of the UAW-CIO, to make a public speech soliciting support for the Oil Workers International Union-CIO, set out the essential nature of the Section 7 right to discuss and receive information concerning unionization:

> "Thomas went to Texas for one purpose and one only—to make the speech in question. Its whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members. These also were the sole objects of the meeting. The campaign, and the meeting, were incidents of an impending election for collective bargaining agent, previously ordered by national authority pursuant to the guaranties of national law. Those guaranties include the workers' right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such organization. It included, in this case, the right to designate Local No. 1002 or any other union or agency as the employees' representative. It included their right fully and freely to discuss and be informed concerning this choice, privately or in public assembly. Necessarily correlative was the right of the union, its members and officials, whether residents or nonresidents of Texas and, if the latter, whether there for a single occasion or sojourning longer, to discuss with and inform the employees concerning matters involved in their choice."

Given the nature of the "guarantees of national law" this Court has struck down a variety of state and local efforts to impede access by unions to employees on the streets and in the parks and other similar public places, *see*, cases cited on p. 19 *supra*. For this aspect of labor law has developed as an integral part of the law of the First Amendment which deals with "the public forum", *see* Kalven, *The Concept of the Public Forum: Cox* v *Louisiana*, 1965 Supreme Court Review 1. As Professor Kalven notes; *Id.*, at 12, the law in this area has been responsive to the argument "that in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum which the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom." Surprisingly enough however in light of the fact that the main purpose of the Act was to free self-organization from employer restrictions, the law governing employer impediments to free access of organizers to employees developed under the Act has not kept pace with the First Amendment developments. Indeed prior to the *Excelsior* decision, which was rendered thirty years after the passage of the Act, the employer's power to thwart union access to employees during organizing campaigns remained unimpaired. For the employer's basic power in this regard rests in his control of the plant property and of the list of his employees' names and addresses. And neither of these citadels had been breached prior to *Excelsior* despite the fact that "apart from the suppressors of outright dishonesty, no regulatory principle has received wider application in the field of elections than the notion that each side should be given substantial access to the voters," since "the opportunity to reach *all* the [voters] is basic to a fair and informed election", Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor*

Relations Act, 78 Harv. L. Rev. 38, 92, 99-100 (1964) (emphasis added).

The forum to which unions have traditionally sought access, through the Act, is the plant, the natural and appropriate place for the exercise of the right of employees to "fully and freely . . . discuss and be informed" concerning unionization and the "correlative . . . right . . . of union[s] . . . to inform employee[s]" about this subject, since it is the focus of that portion of workers' lives which is most directly affected by the decision to organize, and since it is the site at which contact with all the employees may be made with a minimum of difficulty and expense. As Judge Clark of the Second Circuit has noted, *National Labor Relations Board* v. *United Aircraft Corp.*, 324 F.2d 128, 130 (C.A. 2d Cir., 1963), *certiorari denied*, 376 U.S. 851:

> "The chances are negligible that alternatives equivalent to solicitation in the plant itself would exist. In the plant the entire work force may be contacted by a relatively small number of employees with little expense. The solicitors have the opportunity for personal confrontation, so that they can present their message with maximum persuasiveness. In contrast, the predictable alternatives bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness. Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket. Television and radio appeals, where not precluded entirely by cost, would suffer from competition with the family's favorite programs and at best would not compare with personal solicitation. Newspaper advertisements are subject to similar objections. Sidewalks and street corners are subject to the vicissitudes of climate and often force solicitation at awkward times, as when employees are hurrying to or from work."
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> "It is inevitable that the thrust of an organizational drive would be blunted by rules which cut into a worker's use of his own time and made his association and

expression subject to management limitations. Clearly the existence of available alternatives would not mitigate this deleterious effect or insure the employee the organizational freedom which the Act seeks to give him."

To be sure, requiring the employer to open his plant to permit the exercise of these rights conflicts with his common law property rights just as the interdiction of the discriminatory discharge conflicts with the employer's common law employment rights, *cf., Jones & Laughlin, supra,* 301 U.S. at 45-46. But the Act was intended to change the common law balance and the Board and this Court quickly realized that since the plant "is the place uniquely appropriate and almost solely available" to employees for the exercise of their full freedom of association, "inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining". *Republic Aviation Corp. supra,* 324 U.S. at 802, ns. 6 & 8. Thus in *Republic Aviation* this Court approved Board rulings that an employer could not, consistent with the Act, prevent employees from soliciting for the union or distributing union handbills during non-working time and in non-working areas of the plant. Further, in *Stowe Spinning Co., supra,* 336 U.S. 226, the Court approved a Board ruling that an employer violated the Act when he discriminatorily closed the only meeting hall in a company town to a union meeting. However, in *Babcock & Wilcox, supra,* where the Board had ruled that non-employee organizers, as well as employees, could distribute union literature during non-working time in non-working areas of the plant, this Court held, 351 U.S. at 112-113:

> "It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not

discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit."

* * *

"No restriction may be placed on the employee's right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp.* v. *NLRB*. 324 U.S. 793, 803. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records."

And in *United Steelworkers (Nu-Tone Inc.), supra*, 357 U.S. 357, 363-364, where the question of what constitutes discriminatory enforcement of non-solicitation rules was at issue, the Court followed the approach of *Babcock & Wilcox*.

Thus the applicable law, where the non-working areas of a plant are sought as a forum, is that employee solicitors and handbillers are protected by the Act unless there are special circumstances which require restrictions in order to maintain production or discipline, but that non-employee organizers are barred unless they can show that alternative channels of communication are closed. It is our view that the portion of the law addressed to employee activity, while not as broad as it should be, *see, Stoddard-Quirk Mfg. Co.*, 138 NLRB 605 (1962), is basically sound. For it proceeds from the premise that the common law of property is not the key, *see*, p. 25, *supra; cf., Marsh* v. *Ala-*

bama, 326 U.S. 501, 506 (1946), and that the solution to the problem posed is to be found by balancing the substantial interests involved—the statutory right of employees to "fully and freely . . . discuss and be informed concerning" unionization, and the employer's interest in efficient production and discipline. It is also our view that the portion of the law addressed to non-employee organizer activity is unsound.

First, the *Babcock & Wilcox* rule acknowledging the value of contacts between employees and professional organizers, promises a measure of flexibility in the regulation of access to the plant: "This is not a problem of always open or always closed doors for organization on company property" 351 U.S. at 112. In *Babcock & Wilcox*, however, it was found to be practically and practicably impossible to distribute handbills to the majority of employees entering the plant, since they drove to work. Nor had other methods of contact proved fruitful. The union succeeded in contacting only 20% of the company employees away from the plant, and to achieve this measure of communication it was forced to rely on chance contacts in the business district, telephone or mail contacts (only 60% had telephones), or trips to the employees' houses which were scattered over a radius of 30 miles, 109 NLRB at 492-493, 351 U.S. at 106-107. Taking this background as their cue on the quantum of proof necessary to open the plant gates, the lower courts have concluded that a showing of greater expense or formidable practical difficulty is insufficient and that only impossibility will suffice. Thus in the normal organizing campaign *Babcock & Wilcox* has resulted in total subordination of the right of employees to be fully and freely informed concerning unionization at the plant and the "correlative . . . right . . . of union[s] . . . to inform employee[s] . . ." about this subject to the employer's interests. Entry is allowed only where the employees live on the employer's property or where the employer enforces an unlawfully broad nonsolicitation rule, *compare*, *May Co.*, 136 NLRB 797, *en-*

forcement denied 316 F.2d 797 (C.A. 6th Cir., 1963), *with, Montgomery Ward & Co.* 145 NLRB 864, *enforced* 339 F. 2d 889 (C.A. 6th Cir., 1965), and, *S. & H. Grossingers Inc.*, 156 NLRB 233, *enforced as modified* 372 F.2d 26 (C.A. 2nd Cir., 1967).

Second, this result was not arrived at through an inquiry into the balance to be struck between the substantial employer and employee interests at stake. Indeed, it could not have been arrived at in this manner without reconsidering the rationale of *Republic Aviation*, a step which *Babcock & Wilcox* did not purport to take. For *Republic Aviation* recognizes that, absent special circumstances, union activity in non-working areas of the plant is compatible with the employer's interest in efficient production and discipline. Thus the employer interest protected by *Babcock & Wilcox* is his bare claim to an absolute right to dominion over his property, a right claimed simply to prevent his employees from hearing and heeding a union message and possibly organizing to his detriment, *cf., Logan Valley Plaza, supra,* 391 U.S. at 324-325. And it is precisely because the *Babcock & Wilcox* rule is not grounded in an inquiry into the substantial interests involved, nor rooted in the law which had preceded it, that it has resulted in the resurrection of a rule which had plagued the development of labor law prior to the passage of the Act and which this Court had squarely repudiated when called upon to face it directly in *AFL* v. *Swing*, 312 U.S. 321 (1941)—that organizing activity otherwise proper becomes improper if undertaken by those who are not employees of the particular employer involved. In *Swing* (*Id.* at 323) this Court answered affirmatively the question, "[Is] the constitutional guaranty of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is not immediate employer-employee dispute":

"A state cannot exclude workingmen from peacefully

> exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. * * * The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's Case." (*Id.* at 326.)[5]

Third, quite apart from its substantive nature and effect, the *Babcock & Wilcox* rule is unsound because it has proved impossible to administer in a rational manner. As Dean Bok of the Harvard Law School has stated, Bok, *supra.*, 78 Harv. L. Rev. at 95-96:

> "Once one moves beyond the clear case, it becomes extremely difficult to determine whether satisfactory alternatives actually exist for [unions to reach] the employees. What if only half of the employees cross the adjacent sidewalk? The remaining workers must presumably be reached by other means such as house calls and home mailings. But what if the union lacks a comprehensive mailing list, as is often the case? And how many visits can one expect the union to make if there are x number of employees living within a radius of y miles? Radio and newspaper appeals provide fur-

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[5] Section 8(b)(4) of the Act must, of course, be taken into account in evaluating the present standing of *Swing* in relation to activity deemed to have a coercive aspect, *see, National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). But Section 8(b)(4) does not bolster *Babcock & Wilcox* for that section focuses activity at the plant; it does not seek to direct it elsewhere, *see, United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)* 376 U.S. 492 (1964).

ther possibilities to be taken into account. But how satisfactory are they? And should small unions be held to more costly alternatives of this kind? These questions will require time and money to investigate—much more time and money, one suspects, than a [illegible] cost which employers will have to incur if they must allow the employees to distribute on their parking lots. Moreover, any attempt to weigh dissimilar methods of communication is bound to produce inconclusive and subjective decision in an area where clear rules are particularly important. Without such rules, management may be unable to judge whether satisfactory alternatives will be found to exist, particularly since the employer may lack complete information regarding the union's capability to reach the employees. Under these circumstances, some employers will allow distribution in doubtful cases to avoid any risk of legal proceedings. Others will be tempted to prohibit distribution if any case can be made for doing so, for in this way they can force the union either to suffer the consequences in the election or to contest the issue during many months of litigation. As a practical matter, therefore, one may doubt whether just results will in fact be achieved."

"In view of all these problems, there is much to be said for avoiding consideration of alternative channels of communication in these cases. . . . . Thus the Board would do well to follow the lead of the Second Circuit by pointing out explicitly that "in addition to being an appreciable increase in the Board's already unwieldy work load, [the consideration of alternative means of communication] . . . would simply be an incitement to litigation and casuistry."

Dean Bok's critique is two-pronged. Assuming that the Board had world enough and time it is most unlikely that it could apply the *Babcock & Wilcox* rule to particular cases in a satisfactory and predictable manner. For a serious effort to grapple with the task set out in *Babcock & Wilcox* requires the Board to balance a "complex of variables" which include a host of unruly "incommensurable quantities," *Case Note: Excelsior Underwear*

Inc., 80 Harv. L. Rev. 459, 462 (1966). And as this Court has recognized, in the related area of Board regulation of economic weapons, it is inconsistent with the Act, to allow, or we would add to require, the Board to decide that a particular form of action is improper on the subjective ground that it gives employers or unions "too much power." *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, 317 (1965). Yet in the last analysis, because of the incommensurable nature of the variables to be weighed, decision-making based on that subjective standard is precisely what *Babcock & Wilcox* requires. Moreover the Board does not have an infinite amount of time to engage in an abstract logical exercise. Its function is to develop and apply manageable rules to govern the fast moving events of an election campaign. Thus even if one had confidence in the proposition that *Babcock & Wilcox* sets out a standard which could be applied rationally in the long run, it would still be open to criticism on practical grounds since the regulatory context calls for clear rules rather than imprecise standards which are "an invitation to litigation and casuistry," *United Aircraft, supra*, 324 F.2d at 130.

3. In light of the above it is plain that there is no merit in the proposition, advanced by Respondent, that the scope of the *Babcock & Wilcox* rule should be enlarged and that it should become a rule of general application. Nor, we submit, is it desirable to do no more than limit *Babcock & Wilcox* to property cases involving non-employee organizers. To do so would require the Board either to continue to weigh "practically incommensurable quantities" in order to "determine whether existing means of access, including the availability of names and addresses, are sufficient to achieve free" access when unions seek the plant as a forum, *Case Note, supra.*, 80 Harv. L. Rev. at 462-463, or to escape this intractable problem by holding that *Excelsior* "[raises] a presumption of adequate union access," *Ibid, see, General Electric Co.*, 156 NLRB 1247

(1966). While such a presumption would not be soundly grounded in practical realities, *see* pp. 20-21, *supra*, it would, if past experience is a guide, be "virtually impossible" to overturn, *Case Note*, *supra*, 80 Harv. L. Rev. at 463. And the implementation of such a presumption would entail special rules for employees on the plant, for non-employee organizers on the plant, for non-employee organizers off the plant, for employers on or away from the plant, etc., each developing separately and inconsistently without reason as a guide. What is necessary instead is a return to the approach foreshadowed by *Thomas* v. *Collins*, an approach which builds upon the recognition that the Act was intended to put an end to unjustified impediments to free access by organizers to employees erected by employers, or by state or local governments. For only such an approach provides the principled basis for the development of the law in this area required for rational administration of the Act.

In *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1948), this Court stated that the "liberty of circulating is as essential to freedom [of speech] as liberty of publishing, indeed, without the circulation the publishing would be of little value, *Ex Parte Jackson* 96 U.S. 727, 733." Thus methods of communication as well as the content of such communication are entitled to the protections of the First Amendment. The prophet is not condemned to the wilderness, for the Constitution, which recognizes that the entire society suffers when the opportunities of potential publishers and their auditors are interfered with, insures that a speaker is to have effective access to the audience he seeks to reach, *cf.*, *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965); *Talley* v. *California*, 362 U.S. 60 (1960). To be sure, the circulation of views involves conduct which may impinge on other values and interests and may on that account be subject to some regulations relating to time, place, manner, and circumstances, *see*, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); but as Professor Kalven has

noted, the balance which the Court has struck is one which recognizes that there is a "weight of enthusiasm for the personal right involved." Kalven, *supra*, 1965 Supreme Court Review at 16. The governing standard is that enunciated in *Schneider* v. *State*, *supra*, 308 U.S. at 161):

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of these rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."
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> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." (Footnote omitted.)

Broad freedom to circulate is the norm and abridgments are to be tolerated only when they protect the most compelling countervailing interests and are stated in the narrowest terms. Since the freedom to circulate views enjoys the same high place in the gamut of values established by the Act that it does in the Constitutional scheme, *see*, *Thomas* v. *Collins*, *supra*, 323 U.S. at 533-534, it is natural and appropriate for the Board in assessing employer impediments to the enjoyment of the "full freedom to discuss and be informed concerning" unionization and to the "correlative . . . right . . . of union[s] . . . to inform employee[s]"

about this subject to be guided by the balance struck in *Schneider*. For there is no possible policy consideration which justifies according a higher value to employer interests in conflict with free and untrammeled access to employees than is accorded to the conflicting interests of state governments. The common object of both the Constitution and the Act is to maximize the opportunities for free access in order to "insure the opportunity of all employees to be reached by all parties" (A.24).

Schneider and the cases following it do not simply set out the governing standard; they also set the weight to be accorded the competing interests which must be considered in determining whether unions are to have access to the plant and access to a list of the employees' names and addresses. First, the rationale of the First Amendment cases demonstrates the soundness of the position, approved in *Republic Aviation Corp., supra.*, 323 U.S. at 802, n. 6., that in light of the Act's special solicitude for the circulation of views concerning organization among employees, the plant is an appropriate forum for the dissemination of such information. It is, of course, true that in the First Amendment area this Court has dealt primarily with the right to circulate views on the streets and in the parks. These facilities are clearly appropriate for communication, since they have "immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions," *Hague* v. *CIO, supra,* 307 U.S. at 515. Thus there has been little occasion for the Court to refine the considerations that make a particular place an appropriate situs for discussion and communication. But as Judge Kaufmann of the Second Circuit has stated, *Wolin* v. *Port of New York Authority,* 392 F.2d 83, 89 (C.A. 2nd Cir., 1968), *certiorari denied* 393 U.S. ....., 37 Law Week 3177, drawing upon the essence of this Court's views, the "character of the place, the pattern of usual activity, the nature of its essential purpose and the popula-

tion who take advantage of the general invitation extended" are the relevant criteria in determining whether a particular site is "an appropriate place for communication of views on issues of political and social significance." Thus:

> "The privacy and solitude of residents may require that apartment house hallways be insulated from the excitement of volatile exhortations, or the quiet dignity of judicial administration may dictate that courthouse passages be kept free of demonstration. But that is a result based on wisdom and experience because the abrasions caused by any protected speech would too greatly interfere with other interests. . . . However, [a particular area is an appropriate place] for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order. . . . The congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum" (*Id* at 90).

These considerations make it manifest, as the Board has always recognized, that for the purposes of organizing campaigns covered by the Act, the plant is an appropriate forum. And once appropriateness is established there can be no doubt that the right to circulate views can not be barred by an appeal to the argument that the owner, whether public or private, has the unfettered property right to exclude any one he wishes. Where the right to circulate views is at stake, common law property rights, based on the concept of absolute dominion over areas open to the audience the speaker wishes to reach, have no legitimate role to play. In this context, as in maritime law, these concepts, whose roots may be traced "to a heritage of feudalism" are not applicable "in an industrialized American society," *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 631-632 (1958). Thus, like the common law of libel, property concepts must, in appropriate instances, give way to our "profound national commit-

ment to the principle that debate on public issues should be uninhibited, robust and wide open,'' *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964):

> ''The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of [a walkway in a shopping center] by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here.''
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> ''Therefore, as to the sufficiency of respondents' ownership of the Logan Valley Mall premises as the sole support of the injunction issued against petitioners, we simply repeat what was said in *Marsh* v. *Alabama*, 326 U.S., at 506, ''Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.'' *Amalgamated Food Employees* v. *Logan Valley Plaza*, *supra*, 391 U.S. at 324-325.

Second, the right to circulate views at an appropriate place cannot be barred by an appeal to the argument that other places remain open for their expression. The fact that the State has afforded an opportunity for discussion elsewhere is not sufficient to sustain State action which works a substantial interference with communication. Since the thrust of the First Amendment is to maximize communication, the law simply distinguishes between appropriate and inappropriate locations for public speech; it does not seek to restrict publishers to a single site that the courts or the states believe to be ideal, necessary or most appropriate. Within these wide limits it is for the individuals involved to determine how best to propagate their message:

> "It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State, supra,* 308 U.S. at 163.

Thus *Schneider, Logan Valley Plaza,* and *Wolin* highlight the basic defect in the *Babcock & Wilcox* rule. Where interference with the right to circulate views is shown it is for the State, or the employer, to justify the abridgment, not for the speaker to justify his right to inform, for the principles underlying the First Amendment, and the Act, are his justification. For this reason, so far as we are aware, there has never been a First Amendment case in this Court in which a speaker seeking the right to use a particular appropriate forum has been required, as a precondition to the exercise of this basic right, to establish that alternative channels of communication are closed to him. *Babcock & Wilcox* diverges from the main stream of the entire body of relevant law in this area since, without supplying a reasoned basis for doing so, it rejects the balance of interests worked out in *Schneider,* and does so in a manner which stands the First Amendment on its head. The burden of proof is taken from the shoulders of those who would curtail communication and placed on those who wish to communicate, and as we have noted, p. 27 *supra,* that burden is a heavy one.

Third, the right to circulate views at an appropriate place cannot be barred by an appeal to the argument that group, rather than individual, notions of the right to privacy, control, and that it is for the State, rather than the individual, to decide whether he shall be free to hear what he wishes to hear. As this Court stated in *Martin* v. *Struthers,* 319 U.S. 141, 143-144, 145-147 (1943):

"We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims [door to door religious solicitations], as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder."

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"While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance."

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"Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *See also* *Lamont* v. *Postmaster General, supra.*, 381 U.S. 301.

Thus, *Martin* v. *Struthers* demonstrates that free access can not be stifled by group decision, even when the individuals to be approached are voting members of the group. It is *a fortiori*, then, that the employer, who has his own interests to consider, interests which are often separate

from and to a marked degree antagonistic to those of his employees, can not speak for them.

In sum, we suggest that in weighing competing interests when dealing with employer impediments to the right of employees "fully and freely to discuss and be informed concerning" unionization, and the "correlative . . . right . . . of union[s] . . . to inform employee[s]" about this subject, the Board should be guided by the *Schneider* standard and by the concrete applications of that standard in *Schneider* itself, in *Logan Valley Plaza*, and in *Martin* v. *Struthers*. In making this suggestion we do not mean to imply that employer impediments and state impediments to free access are completely fungible; rather it is our position that the two are so analagous that the weight to be given such competing claims as property rights, the right of privacy, etc. is basically the same, *see Thomas* v. *Collins; cf., Linn* v. *Plant Guards*, 383 U.S. 53 (1966). In each situation it must be remembered that the right to circulate views is a "fundamental right" and that the opportunity to reach all voters is "basic to a fair and informed election." Bok, *supra*, 78 Harv. L. Rev. at 99-100.

4. The metaphysical dispute between the common lawyers and the civil lawyers is an ancient one, and as is so often true of arguments from idealized abstractions, it is inherently incapable of resolution. For the substance of the matter is that each of these systems has within it the potential for the making of good law when administered by able men, and neither is a foolproof method for avoiding bad law. Nevertheless, as the instant case demonstrates, this scholarly debate has not been confined to the realm of the legal philosophers, for it has entered the domain of administrative law by the insistence upon legal rules that would dictate to administrative agencies as to their choice between adjudication and formal rulemaking. We submit that in this area the better part of wisdom is a healthy skepticism toward those who claim that there are rules enforceable by the courts which demarcate the proper sphere for formal

rulemaking and for adjudication.[6] As this Court has consistently recognized, "Any requirement . . . [of] quasi-legislative promulgation of rules to be applied in the future . . . would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise," *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947). Thus "the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency," *Id.* at 203, *see also*, *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 371 (1965).

The course marked in *Chenery* is parallel to the one taken by Congress in adopting the Administrative Procedure Act (60 Stat. 237, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 *et seq.*). The APA recognizes that administrative agencies may act by adjudication, or by formal rulemaking, and it prescribes the procedures to be followed in each case. It does not undertake to dictate when one mode of procedure or the other is to be utilized, for the definitions of rulemaking and adjudication are general and neither is a watertight compartment, *compare* 5 U.S.C. 551(4) & (5) *with* 5 U.S.C. 551(7). As the Second Circuit stated, *National Labor Relations Board* v. *Beech-Nut Life Savers Inc.*, ... F.2d ....., 69 LRRM 2846, 2848-2849 (C.A. 2nd Cir., 1968):

> "Congress, in giving the National Labor Relations Board quasi-judicial powers, 'cannot have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to "rules," which may apply for the past, for the future, or, more generally, for both. . . .' *NLRB* v. *A. P. W. Products Co.*

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[6] To some extent the drive for these legal rules stems from an impatience with agencies such as the Board which have not utilized the formal rulemaking mechanism. We submit that this impatience is not a proper ground for legal decision. In any event, it is our view, based on thirty years of practical experience, that in light of the nature of the Act, the Board has been wise to follow the course it has chosen.

> [316 F.2d] at 905. Therefore, we hold that either of the congressionally authorized proceedings can be a proper source of Board rules having general applicability and future effect."

As Judge Friendly has pointed out, "where the [statutory] standard is . . . general, it is imperative that steps be taken over the years to define and clarify it—to canalize the broad stream into a number of narrower ones." Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 874 (1961). Thus, one of the central administrative tasks, and the task that the Board performed here, is to develop relatively particularized standards. The question is whether that effort is to be by formal rulemaking or by adjudication. As we noted at the outset, history and logic suggest that a preoccupation with form in this area is unsound. Thus, despite the fact that Judge Friendly is a proponent of formal rulemaking, a reading of his extensive study of what the administrative agencies have been doing in fact does not point toward the conclusion that success has depended on the choice between adjudication or formal rulemaking, *see*, Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 926 (1965). Nor does a reading of the Federal Register leave one with the feeling that rulemaking is the sole avenue to legal excellence. Indeed, focusing on the instant case, we find it extremely difficult to see how the *Excelsior* requirement would have been improved by promulgating it as a formal rule. For the impact of the decision is clear, the reasons for it are fully yet concisely stated, the arguments against it are fully met, the result reached combines a measure of accommodation to a demonstrated need for change with, to say the least, a fair regard for the equitable interests affected by legal change, the proceeding was based on full notice that was designed to reach any interested party, and the substance of the requirement is open to full judicial review. In sum, the result is sound, there is every

indication that it was reached after full deliberation, and the means used were fully consistent with due process and with the demands imposed on the Board as an agency subject to court review. *Excelsior* illustrates the "flexibility of the adjudicative process" which has caused the more thoughtful of the proponents of formal rulemaking to note that "there are some indications of a tendency . . . to overstate the disparity between the modes of proceeding" Shapiro, *supra*, 78 Harv. L. Rev. at 929-930. For the choice is not simply between formal rulemaking and retrospective *ad hoc* litigation, it also includes the setting of rather precise prospective standards at the instance of litigants and against the background of concrete situations.[1]

At an earlier point in our argument, p. 31 *supra*, we noted that the *Babcock & Wilcox* rule has been criticized as an "invitation to litigation and casuistry" because it entails a consideration of complex and incommensurable factors under an imprecise standard. The *Chenery* rule is sound precisely because it is immune to this criticism. The factors that must be considered in determining the method of administrative procedure to employ are certainly as complex as any in the law; and insofar as we are aware, a precise standard to harmonize them has yet to be developed. Thus their consideration is best left to the respective agency's "informed discretion" rather than to rules of law. For there are times when the demands of policy inherent in a situation or a statutory directive, require the drawing of lines more nice than obvious. But there is no reason for drawing such lines when doing so serves no substantive interest. And as we have just attempted to indicate, the gloss the court below sought to place on *Chenery* serves no substantive interest other than the interest of disappointed

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[1] Courts set precise standards that affect others beside the immediate parties as a matter of routine. Indeed that is precisely what the court below did in the instant case.

suitors in maximizing their opportunities for a successful appeal.

The court below took the position that the concept of adjudication cannot comprehend a decision setting new legal standards which are to be applied entirely in the future (A.111-112). This position is tied too strictly to the limitations placed on the federal courts by the Constitution which restricts them to the consideration of "cases and controversies," for the "case and controversy" requirement does not apply to the administrative agencies, *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929). Moreover, the Constitution's requirements are not as strict as the court below evidently supposed, *see, England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). The result of this definition of adjudication is that an agency cannot, in an adjudicative proceeding, combine responsiveness to the need for change with consideration for the equitable interests engendered by change in legal doctrine. Moreover, this definition cannot be used as a source of guidance by an agency going about its business in a normal manner. When such an agency takes up a request for a change in doctrine proposed by a litigant, it does not known whether it will accept the proposal or not. Whether there will be new law is the question under consideration. Yet the rationale of the court below means that a decision against change is adjudication but that a decision for prospective change is not.

This anomaly is certain to have a deleterious effect on the administration of the Act, for it governs an area in which the parties are well organized and have demonstrated the desire to press for change. The question of whether employers should be required to furnish lists of their employees' names and addresses was raised by union litigants; it did not emerge full-blown from the Board's brow. Thus, to engage in formal rulemaking the Board would have had to sidetrack litigation already begun. And the inflexibility which would be entailed in dovetailing adjudication and

rulemaking is not a product of the peculiarities of this case. It is a recurring problem whenever an agency has a continuing stream of litigation coming before it. The result will be to shift initiative from the parties, who know their needs best, to the regulatory agency, which may be reluctant to assume the responsibility for initiating change as opposed to approving it. By thus discouraging change, the definition of adjudication proposed by the court below cuts against the basic insight as to the essence of the administrative process enunciated in *American Trucking Association* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967):

> "The Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice."
>
> "In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."

To pay this price for no discernible return in order to serve an abstraction is unwarranted. In sum, as the Ninth Circuit recently stated the matter, *British Auto Parts* v. *National Labor Relations Board*, ... F.2d ....., (C.A. 9th Cir., No. 21, 883, Dec. 17, 1968) (sl. op. 3):

> "[T]he question whether an employer could at all or should be required to provide the addresses of his employees for purposes of a representation election was a salient issue in the *Excelsior* controversy. Thus

it manifestly constituted a matter that the Board was entitled to consider, rule upon, and resolve in the *Excelsior* proceeding. To us it seems clear that [the Board's holding] constituted finding, conclusion and order resting on decisional element and incident in the controversy before it and so inherently represented adjudicative process and result.

"While the Board engaged in spelling out the nature and significance of its holding and the details of the practical operation thereof, such facilitating implementation would not in our opinion nullify the decisional or adjudicative character and basis of what it had done. It would be only natural that, with its heavy burden of work, the Board would seek to leave no possibility for claims of confusion and misunderstanding . . .

"Further, we are not able to see how the fact that the Board chose not to make the decisional rule which it laid down controlling of its relief in the particular situation could alter the legal aspect or significance of its general adjudicative holding. We are not aware of any authority, other than the devisive holding in *Wyman-Gordon*, that a rule which has been laid down by an administrative tribunal on adjudicative element and process in a controversy before it is without force or effect as a decisional rule unless it is made to have application to the parties and to the relief of the immediate proceeding."

CONCLUSION

For the foregoing reasons, as well as those stated by the Board, the decision of the court below should be reversed, and the case should be remanded to the court of appeals with directions either to affirm the judgment of the district court enforcing the subpoena or to remand the case to the district court for the entry of an injunction in accordance with count II of the complaint. In doing so this Court should make it clear that the *Excelsior* rule is a proper method for implementing the right of employees "fully and freely to discuss and be informed concerning"

unionization and the "corrective . . . right . . . of union[s] . . . to inform employee[s]" about this subject, *Thomas* v. *Collins*, 323 U.S. 516, 533-534 (1945) since it comports with the standards enunciated in *Schneider* v. *State*, 308 U.S. 147, 161 (1939).

Respectfully submitted,

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January, 1969

QUESTIONS	REGIONS: Boston	New York	Philadelphia	Baltimore	Atlanta	New Orleans	Knoxville	Cleveland	Indianapolis	Detroit	Milwaukee	St. Paul	Chicago	St. Louis	Tulsa	Fort Worth	Denver	Portland	San Francisco	Puerto Rico	Los Angeles Comm.	Totals Approximate Averages, and "Consensus"
Total elections surveyed	7	54	20	66	34	3	52	50	27	15	35	14	48	39	51	14	5	8	11	16	211	780
Elections with captive audience speeches	7	49	7	47	25	3	48	20	19	14	18	13	21	36	39	14	3	1	7	8	170	570 (73%)
Smallest unit where captive audience speech is likely to be held	10	65–70	10–20	20	(1)	(1)	(1)	20	15–20	10	15–20	6	15	3	30	(1)	(1)	5	2–20	25	10	10–20
Period prior to election when most captive audience speeches occur	2 da.	1 wk.	1 wk.	2 da.	2 da.	(2)	2 da.	—	10 da.	1 wk.	2da. 1wk.	25 hr.	3 da.	2 da.	2 da.	2 da.	1 wk.	2 da.	2da. 1wk.	2 da.	2 da.	2 days–1 wk.
Time for reasonably adequate reply by ordinary methods of communication	2 wk.	2 wk.	1 wk.	1 wk.	1 wk.	1–2 wk.	1–2 wk.	2 wk.	2 wk.	2 wk.	2 wk.	1 mo.	2 wk.	1 wk.	2 wk.	1 wk.	1–2 wk.	1–2 –4 wk.	1–2 wk.	—	2 wk.	1 week–2 wk.
Largest unit for reasonably adequate reply by ordinary methods	25	25–50	100	25	100	50–75	50	50	15–20	25	50 100	225	50	25	25	100	25	10–25–50 100	50–100	—	25	25–50
Elections with company mailings	6	48	9	41	25	3	52	20	18	15	29	11	31	39	47	14	2	1	7	9	165	592 (76%)
Elections with union mailings	7	40	13	17	20	1	25	30	13	5	30	10	40	27	43	12	5	2	9	6	150	505 (65%)
Largest unit for obtaining names by traditional methods	15–20	65–70	200	50	100	(3)	50–250	30	45	20	75–100	50	100	50	75	50	25–50	40 50	100	50–75	30	50–75
Percentage of time spent in campaign obtaining names and addresses	50	40–45	25	25	30	(4)	30	—	55–60	(4)	30	35	25	20	30	25	50	30	20–25	25–35	15	30+%
Percentage of names and addresses obtained by traditional methods	10–30	45–50	80	60	65	30–50	50	50–60	65	30–40	50	30	40–55	35–65	60	50–60	40–60	60–80	40–60	25	50	50–55%
Elections with union house calls	7	28	14	53	34	3	47	50	25	7	35	14	43	39	36	14	5	8	11	11	190	675 (86%)
Percentage of employees contacted by house calls in average campaign	15–30	30–35	70	60	40–50	10–50	35–45	20–40	25	20	35–50	30	50	35–50	20	50–60	25	30–80	18–40	35	25	35–40%

NOTES

(1) "All units"—"regardless of size"
(2) "First meeting, when campaign begins"
(3) "Practically impossible—workers are known by first names only"
(4) "Effort never stops"—"constant"

EXPLANATION

This chart tabulates data on the use of captive audience speeches and address lists in representation election campaigns during calendar year 1964. Questionnaires were sent to the twenty regional directors of the AFL-CIO and the head of the Los Angeles Organising Committee. The complete questionnaires, containing both statistical data and extensive comment (from which were drawn the quotations in the brief), are available for inspection at AFL-CIO Headquarters.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 463

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WYMAN-GORDON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 109–118) is reported at 397 F. 2d 394. The opinion of the district court (A. 101–106) is reported at 270 F. Supp. 280. The decision of the Board's Regional Director, out of which the instant case arose (A. 9–11, 29–34), is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1968 (A. 119). The petition for a writ of certiorari was filed on August 30, 1968, and was granted on November 12, 1968 (A. 120). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and of the Administrative Procedure Act, as amended (60 Stat. 237, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 *et seq.*), are set forth in Appendix A, *infra*, pp. 55–60.

QUESTIONS PRESENTED

1. Whether the requirement that employers must furnish the National Labor Relations Board with the names and addresses of the employees eligible to vote in a representation election—information which the Board makes available to the contestants in the election—is invalid because the agency promulgated it in an adjudicatory proceeding rather than under the rule-making procedures of the Administrative Procedure Act, and made it applicable only prospectively.

2. If the first question is answered negatively, whether, where an employer refuses to furnish such information, the Board may compel its production through an appropriate proceeding—either to enforce a Board subpoena or for injunctive relief—in a federal district court.

STATEMENT

In *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966),[1] a representation proceeding under Section 9(c) of the Act, the Board decided that, in order to provide the broadest possible access of contestants to the employee electorate and to facilitate the resolution of voter eligibility questions, an employer would

[1] The Board's opinion in *Excelsior* is set forth at A. 12–28.

be required to file with the Board's Regional Director, prior to the conducting of a representation election, a list of the names and addresses of the employees eligible to vote therein, and that the Regional Director would then make the list available to all parties to the proceeding.[2] However, "to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated," the Board further decided that the new requirement would not be applied in that case, but would be applicable only to elections directed, or consented to, 30 days thereafter (A. 17, n. 5, 27). The instant case, the election in which was directed seven months after the *Excelsior* decision, grows out of respondent Company's refusal to comply with that requirement.

On July 12, 1966, the International Brotherhood of Boilermakers filed a petition, pursuant to Section 9(c)(1) of the Act, seeking to represent the Company's employees at its plants in Worcester, North Grafton, and Millbury, Massachusetts (A. 4, 8). Subsequently, another labor organization, the United Steelworkers of America, intervened in the representation proceeding, competing for the employees' support (A. 4). After investigation and hearing, the

[2] The unions involved in *Excelsior*, and in a companion case (*Kellogg*) which was consolidated with it, had filed objections to the elections on the ground, *inter alia*, that the employers' refusal to furnish a list of the names and addresses of the employee-voters had deprived them of an adequate opportunity to counter misleading campaign literature promulgated by the employers (A. 13, 14).

Before reaching its decision in *Excelsior*, the Board obtained the views of leading employer and union groups, which filed briefs and presented oral argument as *amici curiae* (A. 15).

Board's Regional Director directed that an election be held in a unit consisting of the approximately 1750 production and maintenance employees at the three plants (A. 4, 10, 30). The Regional Director further directed the Company to furnish, prior to the election, a list of the names and addresses of the eligible voters, as required by the Board's *Excelsior* decision, so that the list could be made available to the parties involved (A. 11, n. 3).

The Company notified the Regional Director that it would not furnish such a list; the election was held without it, and both of the Unions lost (A. 29–30, 32). The Unions filed objections to the election based on the Company's refusal to furnish the list (A. 30). The Regional Director upheld the Unions' objections, set aside the first election, and directed that another election be held; the Board sustained this action (A. 31–35).[3] The Regional Director again directed the Company to furnish an employee list to the Unions (A. 36–37).

When the Company again refused, the Regional Director, pursuant to Section 11(1) of the Act, issued a subpoena *duces tecum* requiring the Company to produce its books and records showing the names and addresses of the employees eligible to vote in the election, or, in lieu thereof, a list containing that information (A. 38–39). The Company moved to quash the

[3] In rejecting the Company's arguments, the Board noted that "it is well known that *Excelsior* issued only after oral argument and briefs, including *amicus curiae* briefs by interested parties," and that it had "considered arguments such as those made here * * *" (A. 33).

subpoena; the Board denied the motion (A. 40–42). When the Company still refused to comply with the subpoena, the Board brought an action in the United States District Court for the District of Massachusetts to enforce the subpoena, or, alternatively, for a mandatory injunction directing the Company to comply with the *Excelsior* requirement (A. 3–7).

The district court found that the *Excelsior* requirement was a valid exercise of the Board's statutory authority and was properly promulgated in an adjudicatory rather than a rule-making proceeding, and accordingly enforced the subpoena (A. 101–106). However, the court of appeals (with Judge Coffin dissenting) reversed. That court characterized the *Excelsior* requirement as one "to which we see little or no objection and for which there is much to be said" (A. 112), and stated that it was "not * * * greatly impressed with the arguments challenging the wisdom of the *Excelsior* rule" (A. 110). Nonetheless, it held the employee-list requirement invalid because it was not promulgated in accordance with the requirements prescribed for rulemaking procedings in Section 4 of the Administrative Procedure Act (5 U.S.C. 553), and had been made prospective only in effect (A. 111–113). The court below further concluded that the *Excelsior* rule was not simply "procedural", as distinguished from "substantive", in nature (A. 113), thereby rejecting Judge Coffin's analysis pursuant to which Section 4 of the Administrative Procedure Act was by its terms inapplicable (see A. 114).

ARGUMENT

INTRODUCTION AND SUMMARY

In *Excelsior Underwear Inc.*, 156 NLRB 1236, the Board in 1966 decided (1) that an employer would be required to furnish the Regional Director, prior to the conducting of a representation election, the names and addresses of the eligible voters, which list would then be made available to all contestants in the election, and (2) that this requirement would apply only prospectively, to all elections directed or consented to subsequent to 30 days after the date of its decision there. The court below, although it did not reach the merits of the *Excelsior* requirement, strongly intimated its probable approval thereof (A. 110, 112; see *supra*, p. 5). Moreover, the five other courts of appeals which have considered the matter have upheld the propriety of the *Excelsior* requirement, and the Board's authority to impose it. *National Labor Relations Board* v. *Hanes Hosiery Division*, 384 F. 2d 188 (C.A. 4), certiorari denied, 390 U.S. 950; *National Labor Relations Board* v. *Rohlen*, 385 F. 2d 52 (C.A. 7); *Howell Refining Co.* v. *National Labor Relations Board*, 400 F. 2d 213, 216 (C.A. 5); *National Labor Relations Board* v. *Beech-Nut Life Savers, Inc.*, 69 LRRM 2846 (C.A. 2); *British Auto Parts, Inc.* v. *National Labor Relations Board*, No. 21, 883 (C.A. 9), decided December 17, 1968.[4] However, since we anticipate that re-

[4] For the Court's convenience, the opinion of the Second Circuit in *Beech-Nut*, and that of the Ninth Circuit in *British Auto Parts*, neither of which is yet officially reported, are reprinted, respectively, in Appendix B, *infra*, pp. 61–72, and Appendix C, *infra*, pp. 73–77.

spondent Company will seek to sustain the judgment of the court below on the alternative ground that the *Excelsior* requirement is in any event beyond the Board's statutory authority, whatever the propriety of the manner in which it was adopted, we show in Point II (*infra*, pp. 35–40) that the requirement is one which the Board could lawfully prescribe.[5]

Despite indicating that it would probably view the rule as substantively valid, the court below declined to uphold the *Excelsior* requirement simply because, in its view, the Board had followed an improper procedure in adopting it—*i.e.*, it enunciated the requirement in an adjudicatory proceeding instead of pursuant to the rule-making procedures specified in Section 4 of the Administrative Procedure Act (5 U.S.C. 553), and impermissibly made the requirement prospective in operation. We show in Point I (*infra*, pp. 9–34) that the view of the court below is an

[5] Respondent Company filed a brief in response to the Board's petition for certiorari in the instant case which appears to acquiesce in the granting of that petition (see Resp. Br., p. 33). That document was also termed a cross-petition for a writ of certiorari, and was docketed as No. 578, this Term. Respondent sought to raise essentially the same issues which the Board's petition presented, but also urged, *inter alia*, that the Court review the substantive validity of the *Excelsior* requirement. In opposing the cross-petition, on the ground, among others, that it was not timely filed, the Board noted that, were certiorari granted in the instant case, the Company could argue, as an alternative ground for upholding the judgment of the court of appeals, that the *Excelsior* rule was at all events invalid. Certiorari was denied in No. 578 on November 12, 1968, the same date on which certiorari was granted in the instant case.

erroneous one[*] because (1) the Board has discretionary authority to establish a rule such as the *Excelsior* requirement in an adjudicatory proceeding, under *Securities & Exchange Commission* v. *Chenery*, 332 U.S. 194, and to apply that requirement only prospectively in the interests of fairness and sound administration, and (2) Section 4 of the Administrative Procedure Act was inapplicable, in any event, since the *Excelsior* requirement involves a procedural, rather than a substantive rule.

Finally, we show in Point III (*infra*, pp. 40–53) that, where, as here, an employer refuses to furnish the information required by *Excelsior*, the Board may compel its production through an appropriate proceeding in a federal district court—either by enforcement of its subpoena or the issuance of a mandatory injunction.

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[*] Three circuits have expressly disapproved the view of the Court below, *viz.*, the Second Circuit in *Beech-Nut*, *supra* (App. B, pp. 66–68), the Fifth Circuit in *Howell*, *supra*, 400 F. 2d at 216, n. 8, and the Ninth Circuit in *British Auto Parts*, *supra* (App. C, pp. 74–76). Indeed, both the Second and Ninth Circuits discussed at length and then rejected entirely the premises on which the First Circuit's decision in the instant case were based (see *infra*, pp. 16–19, and note 15).

I. THE BOARD'S *EXCELSIOR* REQUIREMENT WAS VALIDLY PROMULGATED EVEN THOUGH THE RULE-MAKING PROCEDURES OF THE ADMINISTRATIVE PROCEDURE ACT WERE NOT UTILIZED

A. THE BOARD HAD DISCRETION TO FORMULATE SUCH A REQUIREMENT IN EITHER AN ADJUDICATORY OF A RULE-MAKING PROCEEDING; ITS CHOICE OF THE FORMER WAS NOT RENDERED INAPPROPRIATE MERELY BECAUSE IT APPLIED THE REQUIREMENT PROSPECTIVELY

The broad discretion of an administrative agency to choose the means by which it formulates policy was established in this Court's landmark decision in *Securities & Exchange Commission* v. *Chenery Corporation,* 332 U.S. 194. The Court there upheld a new standard promulgated by the Securities and Exchange Commission in an adjudicatory proceeding under the Public Utility Holding Company Act. In effect, the Commission's standard, as applied to that case and to future cases, prevented management from realizing a profit on trading in the securities of a company during its reorganization. The Court there rejected the contention that the Commission was precluded from announcing and applying a new principle in an adjudicatory proceeding and that it could only "promulgate a general rule outlawing such profits in future utility reorganizations" (*id.* at 199–200). It pointed out (*id.* at 202) that "any rigid requirement" that the agency was compelled to perform "[t]he function of filling in the interstices of the Act * * * through this quasi-legislative promulgation of rules to be applied in the future * * * would make the ad-

ministrative procedures inflexible and incapable of dealing with many of the specialized problems which arise"; and that, since "the agency must retain power to deal with the problems on a case-by-case basis if the administrative procedure is to be effective, [t]here is thus a very definite place for the case-by-case evolution of statutory standards" (*id.* at 203). The Court concluded that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency" (*ibid.*). See also *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 371; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 421.

The Administrative Procedure Act does not curtail an agency's general discretion to proceed by either ajudication or rule making. That Act prescribes two sets of procedures for agency action: one applicable to administrative "rule making"; the other, to administrative "adjudication."[7] The Act does not, however,

[7] The Administrative Procedure Act specifies the following steps for "rule making": (1) general notice of the proposed rule making must be published in the Federal Register, unless persons subject thereto have been served or have actual notice; (2) interested persons must be given an opportunity to submit their views on the proposed rule; and (3) after consideration of the relevant matter presented, the agency must incorporate in the rules "a concise general statement of their basis and purpose" and publish them in the Federal Register at least 30 days before their effective date (5 U.S.C. 552, 553). The procedure for "adjudication," where applicable, provides for the typical adversary proceeding—notice of the issues, responsive pleading, hearing, and decision (5 U.S.C. 554, 556, 557). Interpretive rules, procedural rules, and general statements of policy are

purport to compel an agency to utilize one procedure or the other. Nor does it even clearly indicate when one or the other would be appropriate, for the definitions of "rule making" and "adjudication" are in general terms and are not mutually exclusive.[8] The legislative history is equally obscure, merely indicating that, in a general way, Congress intended the rule-making procedures to be applicable when the agency was acting as a "legislature," and the adjudication procedures to be applicable when it was acting as a "court."[9]

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exempted from the rule-making procedures (5 U.S.C. 553(b)(3)(A) and (d)); proceedings for the certification of employee representatives are exempted from the adjudicatory procedures (5 U.S.C. 554(a)(6), 556(a), 557(a)), and are thus subject only to the requirements of Section 9(c) of the National Labor Relations Act.

[8] "Rule making" is defined as "agency process for formulating, amending, or repealing a rule," and "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *" (5 U.S.C. 551(5) and (4)). "Adjudication" is defined as "agency process for the formulation of an order," and "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rule making but including licensing" (5 U.S.C. 551(7), (6)).

[9] Commenting on the statutory definitions (see note 8, *supra*), Representative Walter, one of the sponsors of the bill, stated (92 Cong. Rec. 5649 (Leg. Hist. of the APA, p. 355)): "In this bill the accepted analytical terminology has been adopted. Accordingly, we speak of rule or rule making whenever agencies are exercising legislative powers. We speak of orders and adjudications when they are doing things which courts otherwise do." Similarly, the House report asserts (H. Rep. No. 1980, 79th Cong., 2d Sess., p. 17 (Leg. Hist. of the APA, p. 251)): "In stating the essentials of the different forms of administrative proceedings, the bill carefully distinguishes

Applying the principles of *Chenery* and upon analysis of the provisions of the Administrative Procedure Act, the courts of appeals have repeatedly recognized the Labor Board's discretionary authority to establish new policies and principles through decision in particular cases rather than by promulgation of formal rules.[10] For example, in *National Labor Relations Board* v. *A.P.W. Products Co.*, 316 F. 2d 899, the Second Circuit sustained the Board's action in enunciating, in an adjudicatory proceeding, a reversal of its prior practice of tolling back pay for the period between the Trial Examiner's proposed dismissal of

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between the so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights or liabilities in particular cases). It provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies. In the 'rule making' (that is 'legislative') function it provides * * * [and] in 'adjudications' (that is, the 'judicial' function) * * *."

See also 1 Davis, *Administrative Law Treatise*, pp. 287–288, 294, 298, Secs. 5.01, 5.02 (1958): "These various difficulties [of differentiating between adjudication and rule making] are avoided by saying simply that adjudication resembles what courts do in deciding cases, and that rule making resembles what legislatures do in enacting statutes. Then particular problems of classification can be resolved by keeping an eye on the consequences of the particular classification. * * * The meaning of such a term as 'rule' must frequently depend not only upon word contexts but also upon practical contexts. * * * Except when the meaning of authoritative words is beyond dispute, the choice of labels should depend largely upon judgments concerning practical results."

[10] Section 6 of the National Labor Relations Act empowers the Board "to make * * *, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act."

an unfair labor practice charge and the Board's decision to the contrary. The court pointed out (316 F. 2d at 905):

> * * * [M]uch can be and has been said in favor of an agency's invoking the rule-making procedure when it wants to make rules. * * * But our question is not of wisdom but of authority. Congress cannot have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to "rules," which may apply for the past, for the future, or, more generally, for both. * * * The short of it would seem to be that when an administrative agency makes law as a legislature would, it must follow the rule-making procedure prescribed in § 4 [5 U.S.C. 553], and when it makes law as a court would, it must follow the adjudicative procedure, prescribed in §§ 5, 7 and 8 [5 U.S.C. 554, 556, 557]; whether to use one method of law making or the other is a question of judgment, not of power. * * *

To like effect, see *National Labor Relations Board* v. *Penn Cork & Closures, Inc.*, 376 F. 2d 52, 57 (C.A. 2), certiorari denied *sub nom. District Lodge No. 15* v. *National Labor Relations Board*, 389 U.S. 843; *National Labor Relations Board* v. *E & B Brewing Co.*, 276 F. 2d 594, 598 (C.A. 6), certiorari denied, 366 U.S. 908; *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167, 174 (C.A. 4), certiorari denied, 361 U.S. 943; *Optical Workers' Union Local 24859* v. *National Labor Relations Board*, 227 F. 2d 687, 691 (C.A. 5), certiorari denied, 351 U.S. 963; *National Labor Relations Board* v. *Local 182, Teamsters*, 401 F. 2d 509, 510 (C.A. 2). See also Shapiro, *The Choice of Rulemaking or Adjudication in the De-*

velopment of Administrative Policy, 78 Harv. L. Rev. 921, 926–927 (1965).[11] Indeed, in recognition of the fact that the Board has power to promulgate new standards or policies either through the decisional process or through rule-making procedures, Section 14(c)(1), which was added to the Act in 1959, specifically provides that the Board can decline to assert jurisdiction over certain classes or categories of employees either "by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act."

The Board has historically formulated substantive principles and requirements only through the decisional process, and has not as yet used its rule-making authority under Section 6 (see note 10, *supra*) for that purpose. That approach has stemmed from the

[11] This Court has often approved "rules" articulated by the Board in the adjudication of particular cases, without questioning the propriety of that procedure. See, *e.g.*, *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 802–803, nn. 8 and 9; *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 329–335; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344; *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 98–99, 101–102, nn. 9 and 10, 104. Additional instances of the Board's adoption of new policies through adjudication are cited in Friendly, *The Federal Administrative Agencies*, pp. 36–52 (1962), and *National Labor Relations Board* v. *Lorben Corp.*, 345 F. 2d 346, 349–350 (C.A. 2) (dissenting opinion). And see Shapiro, *supra*, 78 Harv. L. Rev. at 926: "Agencies, like courts, frequently evolve detailed and precise rules in the course of adjudication. Indeed, it is worth noting that in Judge Friendly's lectures on the need for better definition of standards, his examples of successful formulation are taken from instances of adjudication [citing Friendly, *supra*, at 27–45]."

Board's judgment that formal rule-making procedures are, as a general matter, too rigid and inflexible for most of the problems with which it is concerned. As the Board has explained, in such complex areas, for example, as secondary boycotts, picketing, the duty to bargain in good faith, and restraint of employees in the exercise of their Section 7 rights, regulation is ordinarily better accomplished through case-by-case adjudication, which permits "gradual development of the law through specific factual patterns * * * [that] emerge from actual industrial experience"; also, the cumbersome process of amending formal rules would impede "the law's ability to respond quickly and accurately to changing industrial practices."[12]

Moreover, and quite significantly, unlike some other administrative agencies, the Board itself cannot initiate its own processes. Rather, its ability to act on a particular matter depends, in the first instance, on the filing of an unfair labor practice charge or a petition in a representation case by an outside party. Lacking independent authority to investigate or over-

[12] Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers of the Senate Judiciary Commitee, October 21, 1968, 69 LRRM 159. See also McCulloch, *Procedures Employed by NLRB in Determining Policy*, Speech to the Administrative Law Section of the American Bar Association, August 11, 1964, 56 LRRM 31. Cf. *Administrative Procedures in Government Agencies*, Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess., p. 98, n. 18.

see the industrial scene generally,[13] the Board frequently becomes aware of a given problem in an area subject to its jurisdiction only when it is raised in the context of a particular case. Thus, the bulk of the Board's experience has been accumulated through the adjudication of issues brought to it by outside parties. Understandably, it has therefore become accustomed to following the practice of evolving substantive rules in adjudicatory proceedings, which, as already noted, has many real practical advantages.[14]

In the light of this background, and since the question of furnishing the employee names and addresses was first raised as an issue in the *Excelsior* case itself (see *infra*, pp. 18–19), the Board did not abuse its discretion in promulgating the requirement in a decision rather than in a formal rule-making proceeding. Accordingly, the Second Circuit in the *Beech-Nut* case, while recognizing that the *Excelsior* requirement was a rule of general applicability and future effect, properly concluded that "[t]he Board can resolve a problem * * * either by quasi-legislative promulgation of general rules designed to meet the problem * * * or in quasi-judicial proceedings when the

[13] Congress' unwillingness to grant the Board such powers is reflected in Section 4(a) of the Act, which precludes the Board from appointing "individuals for the purpose of conciliation, or mediation, or for economic analysis."

[14] The Board has indicated, however, that, in "response to constructive suggestions from judges, students of the law and practitioners," it will give "renewed and full consideration to the wisdom and practicability of substantive rule-making in its administration of the law." Supplemental Memorandum, *supra*, p. 160.

problem arises as an issue in a case before the Board * * * [and that whichever] procedure it chooses to follow in resolving any particular problem is a matter for the Board, in its informed judgment, to decide" (App. B, p. 65). A like approach should have been followed here by the First Circuit.

Indeed the court below expressly acknowledged the Board's authority to promulgate new standards or principles in adjudicatory proceedings, provided they are given effect for the past as well as for the future. It took no issue with the adoption of the employee-list requirement by decision rather than formal rule, and intimated that it thought the requirement a substantively valid one. Nonetheless, on the narrow ground that the Board in *Excelsior* determined to give the requirement there adopted prospective effect only, the court below concluded that the Board's action lost the attributes of adjudication and thus was unlawful. It distinguished *Chenery* on the ground that there the Commission had made the new rule applicable to the parties in that case, whereas in *Excelsior* the Board "did not decide a case between party and party, or more exactly, it decided a case one way, and took occasion to lay down a future rule the other way" (A. 112).

In short, the court apparently would have approved the *Excelsior* requirement had the Board applied it to invalidate the elections involved in that case. But, in the court's view, when the Board failed so to apply the requirement, its action could no longer be deemed an adjudication or the decision of "a case

between party and party." Rather, in its view, it became a quasi-legislative rule that could lawfully be promulgated only in a rule-making proceeding under Section 4 of the Administrative Procedure Act. That narrow ground on which the decision below rests is demonstrably erroneous.

1. Contrary to the court below, the Board in *Excelsior* performed the normal adjudicatory function of deciding a particular controversy between the parties to that case. It was there asked to determine the validity of two representation elections whose fairness was put in issue by objections of the petitioning unions, based on the employers' pre-election refusal to make available to the unions the names and addresses of the employees eligible to vote (*supra*, pp. 2–3; see A. 13–14). In the course of determining that issue, the Board decided to consider the broader question whether the fairness of its election procedures generally would be enhanced by a requirement that all employers file such a list prior to the holding of a representation election, and therefore obtained the views on that matter not only of the parties to the particular proceeding, but of other interested groups as well (A. 14–15). Based upon a consideration of all the information so obtained, the Board decided that its election procedures would be improved by imposing such a requirement on employers generally, but that, out of considerations of fairness to the particular employer there involved, the requirement should only be applied prospectively. Accordingly, after fully articulating the basis for its decision (A. 17–26), it overruled the objections to the elections

conducted in the *Excelsior* case (A. 27). As the Second Circuit concluded in *Beech-Nut,* in these circumstances "[c]learly the rule announced in *Excelsior* was substantially based on the facts and issues of that case" (App. B, p. 67).[15]

This conclusion is not undermined because "the new rule extended beyond the immediate facts of the *Excelsior* case and was designed to be applicable to all future representation elections" (*ibid.*). "[T]he Board in devising a rule is not limited to the particular facts of the case presented to it for adjudication," but is entitled "to bring all its accumulated knowledge and experience to bear on any problem before announcing a rule designed to deal with that problem" (*id.* at 67–68). Similarly, in *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, after noting that "[i]t is the business of the Board to give coordinated effect to the policies of the Act" (*id.* at 348), this Court noted that regulatory "competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding" (*id.* at 349). See also *Phelps Dodge*

[15] As the Second Circuit added, this is not a case where a "rule [has] been tacked onto an opinion dealing with completely unrelated facts and issues" (App. B, p. 67). Similarly, as the Ninth Circuit noted in *British Auto Parts*, the employee-list requirement "was a salient issue in the *Excelsior* controversy," and thus "manifestly constituted a matter that the Board was entitled to consider, rule upon, and resolve" in that proceeding (App. C, p. 75). That court concluded that the Board's action in *Excelsior* "constituted finding, conclusion and order resting on decisional element and incident in the controversy before it and so inherently represented adjudicative process and result" (*ibid.*).

Corp. v. *National Labor Relations Board*, 313 U.S. 177, 194.

2. There is nothing in the definition or concept of "adjudication" which would justify the distinction drawn by the court below. As noted previously (see note 8, *supra*), the Administrative Procedure Act defines "adjudication" as "agency process for the formulation of an order" (5 U.S.C. 551(7)). "Order," in turn, is defined as "the whole or a final disposition, whether affirmative, negative, injunctive, or declaratory in form * * *" (5 U.S.C. 551(6)). The representation proceeding in *Excelsior*, wherein the Board had to, and did, consider the objection by the unions that the elections should be set aside because of the employer's failure to furnish the names and addresses of the eligible voters, was "agency process for the formulation of an order." The Board's decision to overrule those objections and to certify the election results, showing that the unions had failed to obtain a majority of the votes (A. 27–28), was plainly "a final disposition * * * of an agency matter," or an "order." Thus, the literal requirements of the Administrative Procedure Act were complied with in *Excelsior*. Nothing in the language of that Act requires that a general principle formulated in an adjudicatory proceeding must be applied forthwith to the parties thereto, instead of only prospectively.

Moreover, although principles evolved through adjudication usually are applied both to the immediate parties as well as prospectively, there is nothing in the nature of the adjudicatory process or in pertinent judicial precedents which requires this result. On the

contrary, as Judge (later Chief Justice) Vinson stated in *Warring* v. *Colpoys*, 122 F. 2d 642, 645 (C.A. D.C.), certiorari denied, 314 U.S. 678:

> Traditionally, he who questioned the law or the best evidence of it is given the benefit of the new law or the best evidence of it. This is not always the case. There has arisen, for example, when contract rights or property rights growing out of contracts are involved, the exception that the one who argued against the established law is not given the benefit of the change he helped bring about inasmuch as his adversary relied upon the previous law. Such decisions apply the old law to the case at hand while establishing the new law for the future. The Supreme Court has found no constitutional limitation on state courts proceeding in this manner. Federal courts have proceeded similarly. * * *

Indeed, the development by this Court in recent years of a doctrine of complete or partial non-retroactivity of constitutional decisions involving rules of criminal procedure argues strongly that an administrative agency, acting in a quasi-judicial capacity, should have at least similar flexibility in regard to non-criminal matters within its jurisdiction. *E.g.*, *Linkletter* v. *Walker*, 381 U.S. 618; *Tehan* v. *Shott*, 382 U.S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719; *Stovall* v. *Denno*, 388 U.S. 293.[16] We recognize that the Court stopped short, in *Stovall*, of adopting a rule of complete prospectivity. That, however, was viewed as "an unavoidable consequence of the ne-

[16] See also *DeStefano* v. *Woods*, 392 U.S. 631; *Fuller* v. *Alaska*, No. 249, this Term, decided October 28, 1968.

cessity that constitutional adjudications not stand as mere dictum" (388 U.S. at 301). In the administrative context, on the other hand, at least where the issues involved are not constitutional, there is no need to take into account those "[s]ound policies of decisionmaking, rooted in the command of Article III of the Constitution" which the Court in *Stovall* found argued against wholly prospective application of the new rule it had there adopted (*ibid.*). Administrative agencies of course exercise Article I and not Article III powers, even when acting in a quasi-judicial capacity. And neither this Court (*e.g., England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411)[17] nor the State courts (*e.g., O'Brien* v. *Atlas Finance Co.*, 223 Ark. 176, 264 S.W. 2d 839)[18] have been reluctant, in non-constitutional cases, to announce new rules which are to be entirely prospective in operation.

Considerations of fairness to the parties to an adjudicatory proceeding often militate against applying a newly fashioned rule to them, since they obviously had

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[17] As noted in *Johnson*, the Court had, prior to *Linkletter*, "applied new judicial standards in a wholly prospective manner" (384 U.S. at 733). See also *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, where the Court noted that "the federal constitution has no voice upon the subject" of retroactivity versus prospectivity of judicial decisions (*id.* at 364), since a State is free to "make a choice for itself between the principle of forward operation and that of relation backward" (*ibid.*). Lower federal courts have proceeded in a similar fashion. See, *e.g., United States* v. *Youngblood*, 379 F. 2d 365, 370 (C.A. 2).

[18] See Note, *Stare Decisis—Use of the Caveat Device to Announce New Rule of Law Prospectively*, 28 Temp. L.Q. 296 (1954).

no opportunity in their prior conduct to comply therewith. This is particularly so where the new rule does not involve a question of first impression, but rather a change in existing law. That was of course the precise situation involved in the *Excelsior* case, for employers had not previously been required to provide lists of employee names and addresses in connection with representation proceedings. Indeed, the approach taken by the Board there closely parallels the result reached by this Court, and for similar reasons, in *James* v. *United States*, 366 U.S. 213, where the holding that taxable income included embezzled funds was not applied to the defendant there involved (see *id.* at 221–222).[19]

Moreover, administrative agencies ordinarily are intended to be even more flexible in operation than courts. Thus, such agencies consistently have been held to have the authority to apply new principles formulated in adjudicatory proceedings in a prospective manner only. It has been so held not only with respect to other administrative agencies (see *City of Chicago* v. *Federal Power Commission*, 385 F. 2d 629,

[19] Cf. Comment, *Prospective Overruling and Retroactive Applications in the Federal Courts*, 71 Yale L. J. 907 (1962). This comment suggests that federal courts are precluded from announcing rules which operate prospectively only by the provisions of Article III of the Constitution (*id.* at 930–931) (see *Stovall* v. *Denno*, 388 U.S. at 301, discussed *supra*, pp. 21–22). However, as shown above, the federal courts have not consistently agreed with this analysis, at least in regard to non-constitutional matters. Moreover, the comment acknowledges that State courts are in any event not so restricted (*id.* at 933). Similarly, federal courts and agencies established under Article I of the Constitution, such as the Board, would not be so limited. See *Ex parte Bakelite Corp.*, 279 U.S. 438, 449–451.

642–643 (C.A. D.C.); *Safarik* v. *Udall*, 304 F. 2d 944, 948–950 (C.A. D.C.), certiorari denied, *sub nom. Hansen* v. *Udall*, 371 U.S. 901), but also with respect to the Board itself. See *National Labor Relations Board* v. *A.P.W. Products Co.*, 316 F. 2d 899, 905–906 (C.A. 2); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237, 239–241 (C.A. D.C.); *Optical Workers' Union Local 24859* v. *National Labor Relations Board*, 227 F. 2d 687, 691 (C.A. 5), certiorari denied, 351 U.S. 963; *National Labor Relations Board* v. *Majestic Weaving Co.*, 355 F. 2d 854, 860 (C.A. 2). See also Shapiro, *supra*, 78 Harv. L. Rev. at 933–935, 955–957; 1 Davis, *supra*, pp. 351–352, Sec. 5.09.

In short, nothing in either the National Labor Relations Act or the Administrative Procedure Act purports to prevent the Board from determining in its discretion that a principle established in an adjudicatory proceeding should be applied only prospectively. To the contrary, the precedents and considerations of sound administration combine to support strongly the sort of flexibility exercised by the Board in *Excelsior*.

Indeed, the fact that the Board, unlike the Commission in *Chenery*, did not apply its newly announced rule to the parties in *Excelsior* makes that case an even stronger one than *Chenery* for upholding the agency's authority to announce such a principle in an

adjudicatory proceeding.[20] The real controversy surrounding *Chenery*, and in this area of administrative law generally, is whether considerations of procedural fairness preclude an agency from applying a new adjudicatory standard retroactively to conduct occurring prior to its announcement. See *Chenery*, *supra*, 332 U.S. at 203; *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 146–149 (C.A. 9); *Leedom* v. *International Brotherhood of Electrical Workers*, *supra*, 278 F. 2d at 243; *National Labor Relations Board* v. *Majestic Weaving Co.*, *supra*, 355 F. 2d at 860; *National Labor Relations Board* v. *E & B Brewing Co.*, *supra*, 276 F. 2d at 598. The view of the court below that an agency can apply new standards formulated in an adjudicatory proceeding only retroactively would compel administrative agencies either to impose what may be wholly unnecessary burdens on

[20] The propriety of the Board's promulgation of the *Excelsior* requirement in an adjudicatory proceeding is *a fortiori* in light of *Chenery*. In that case the probable effect of the Commission's ruling was "retroactively [to] prevent [the] management from securing the profits and control which were the objects of the preferred stock purchases" (332 U.S. at 203), even though the management was not on notice when it made the purchases that they were illegal. In the present situation, on the other hand, the *Excelsior* requirement was made prospective in operation, in order "to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated" (A. 17, n. 5). And it had been in effect for seven months when, in this case, the Regional Director initially directed the Company to furnish the information (A. 11, n. 3), and for more than fifteen months when the district court so ordered (A. 107).

the participants in cases before them,[21] or needlessly to resort to the rule-making process where an adjudicatory proceeding would constitute an appropriate vehicle for considering the desirability of adopting a new standard or establishing a new requirement.

3. The theory of the court below that an agency is necessarily engaged in rule making rather than adjudication when a new standard prescribed in a decision is to have prospective effect only would make the propriety of an agency's choice between the two methods of proceeding turn on a circumstance which often cannot be anticipated in advance, and which has little bearing on the practical consequences of the agency's action and on the justness of the result reached (see note 21, *supra*). From a realistic point of view, the procedure the Board followed in *Excelsior* achieved, albeit through adjudication, substantially all that the public participation provisions of Section 4 of the Administrative Procedure Act were designed to accomplish. There the Board, upon learning that an issue over access to lists of employees' names and addresses had been raised in the proceeding, sought to and did obtain a broad range of views, by inviting leading employer and union groups to file

[21] Perhaps no injustice would have resulted from applying the *Excelsior* rule to the employers in that proceeding. But it was reasonable for the Board, in *Excelsior*, to seek to avoid any implication of unfairness and the administrative confusion in all other pending representation proceedings that would have resulted from giving immediate effect to the new requirement. Cf. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278, approved in *Rockwell Mfg. Co., Kearney Division* v. *National Labor Relations Board*, 330 F. 2d 795, 798 (C.A. 7), certiorari denied, 379 U.S. 890.

briefs and present oral argument as *amici curiae*, on whether employers should be required to provide such lists prior to elections (A. 15). Consequently, in formulating its decision in *Excelsior*, the Board had the benefit of all the major arguments for and against imposing such an informational requirement.[22] See Shapiro, *supra*, 78 Harv. L. Rev. at 931.[23] Had the Board gone through the formality required by the court below, of publishing a notice of proposed rule making in the Federal Register and of inviting the views of interested parties (see note 7, *supra*), it is extremely unlikely that it would have obtained any more enlightenment on the problem.

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[22] Compare the Board's discussion in *Excelsior* (A. 22-28) of the arguments against adoption of the employee-list requirement, with the arguments raised by the Company here (see *infra*, pp. 35–40).

[23] The court of appeals suggested (A. 111) that, by soliciting "the assistance of selected amici curiae," the Board "designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest." However, the practice of inviting and considering the views of *amici curiae* on issues of wide public concern which arise in an adjudicatory proceeding is an accepted judicial and administrative agency technique for accommodating the public and private aspects of adjudication. It has of course been frequently utilized by this Court and by other federal and State courts. Its use by an administrative agency was expressly approved in *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 359 F. 2d 318, certiorari denied, 385 U.S. 847. There the Fifth Circuit, in sustaining the agency's promulgation, in a rate-making proceeding, of a new rule requiring pipeline companies to pass on the tax saving resulting from liberalized depreciation allowances, and its decision to apply the new rule only to future rates, stated (359 F. 2d at 343):

> In this case the Commission felt that the time had come to reexamine the ratemaking treatment of liberalized depre-

Moreover, the *Excelsior* adjudicatory proceeding was well underway before the Board, as a result of the unions' objections to the elections held in that case, became aware of the employee-list issue and its implication for future proceedings. Under the view of the court below, the Board would then have had two alternatives, neither of which would have served the ends of practical and effective administration. It could have sidetracked the *Excelsior* proceeding itself and started an entirely new rule-making proceeding (see Shapiro, *supra*, 78 Harv. L. Rev. at 929), or else proceeded, without obtaining the views of interested persons, to determine whether to prescribe such an informational requirement, knowing that if it decided to do so that rule would necessarily be imposed on the parties to that case.

Nor was the respondent Company disadvantaged by the Board's enunciation of the *Excelsior* requirement in an adjudicatory proceeding and its failure to apply it to the elections in that proceeding. The Company ob-

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ciation. In applying its new policy to *Alabama-Tennessee*, the Commission could not overlook the wide application the change in policy would have on the natural gas industry. It was for the Commission to decide how to allow interested parties to present their views. It was clearly within the ambit of reasonable discretion to allow participation by amici in oral argument and by the filing of briefs.

We do not say that the Commission chose the best procedure for changing a longstanding policy. As long, however, as the Commission stays within constitutional and statutory limits, it is competent to determine whether to deal with a policy problem in an adjudicatory proceeding, a rulemaking proceeding, or a special proceeding of the type employed in this case[See also, to like effect, *City of Chicago* v. *Federal Power Commission*, 385 F. 2d 629, 643 (C.A. D.C.).]

viously was not affected by the Board's refusal to set aside the elections in the *Excelsior* case itself. Moreover, as the court below recognized (A. 111, n. 1), the fact that the *Excelsior* requirement, as finally formulated by the Board, was not published in the Federal Register, in accordance with 5 U.S.C. 552(a)(1), affords respondent no valid basis for complaint. Respondent had actual notice of the requirement, and it was not applied to it until seven months after it was first enunciated (well after the 30-day period prescribed in 5 U.S.C. 553(d), as noted by the court below, see A. 111, n. 2). Accordingly, the only possible injury to respondent was that, if the Board had followed the Administrative Procedure Act rule-making procedures in prescribing the *Excelsior* rule, it would as a result of the notice of the proposed rule published in the Federal Register (see 5 U.S.C. 553(b), (c)), have had an opportunity to present its views to the Board before the requirement was adopted. But this injury is certainly more theoretical than real, since the arguments on both sides of the issue were fully made by the parties and other interested *amici* (see note 3, *supra*). Moreover, to the extent that respondent had additional arguments, it had the opportunity to present them to the Board in the representation proceeding here initiated by the Unions in an effort to get the Board to abandon, or perhaps at least modify, the *Excelsior* rule (A. 32–33, 41).

In sum, neither sound legal principles nor practical considerations support the view of the court below that, simply because the Board elected to make the *Excelsior* requirement prospective in effect its action in formulating that principle was no longer adjudica-

tion but became rule making, and thus subject to the procedures required by Section 4 of the Administrative Procedure Act. As the Second Circuit concluded in *Beech-Nut* (App. B, p. 68):

> The National Labor Relations Board, like other agencies with quasi-judicial powers has the power to determine that a rule change be prospective if the Board feels that fairness to the parties before it demands that this approach be followed * * *. There is nothing anomalous about a prospective change in a legal rule occurring in an adjudicatory setting. In all fairness sufficient time may be required to permit persons to change systems and modes of dealing with one another * * *.[24]

B. IN ANY EVENT, THE BOARD'S *EXCELSIOR* DECISION ESTABLISHED A PROCEDURAL REQUIREMENT, WHICH IS EXPRESSLY EXEMPTED FROM THE RULE-MAKING PROCEDURES OF THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act explicitly exempts "rules of agency organization, procedure, or practice" from the requirements of advance notice and public participation that are applicable to substantive rule making (5 U.S.C. 552(a)(1)(D), 553(b)(3)(A) and (d)). Assuming *arguendo* that the Board's prescription of the *Excelsior* requirement was "rule making" rather than "adjudication" because of its prospective application, dissenting Judge Conn correctly concluded that its action was nonetheless exempted from the Act's rule-making procedures as

[24] See also the Ninth Circuit's similar approach in *British Auto Parts* (App. C, p. 76).

a rule of agency procedure or practice (A. 114–116).[25]

The requirement that employers file a list of the names and addresses of eligible voters for the use of all election participants[26] is equivalent to provisions for open voting registers commonly utilized in public and other private elections. As such, it is properly viewed as part of the procedural mechanism for conducting the election and registering the will of the voters. See *National Labor Relations Board* v. *Rohlen*, 274 F. Supp. 715, 717 (N.D. Ill.), affirmed, 385 F. 2d 52 (C.A. 7). Its purpose is two-fold: (1) to facilitate communication regarding election issues and thereby enhance the opportunity for an informed electorate;

[25] Procedural rules were exempted because Congress desired "to encourage such rules," and it believed that rules of this sort "vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned." Senate Judiciary Committee Print (June 1945), p. 6 (Leg. Hist. of the APA, p. 18). As the dissenting opinion here noted, these considerations would argue for a liberal construction of "procedural," and this conclusion is reinforced by the relatively restrictive definition and examples of "substantive" rules in the legislative history of the Act (A. 114–115). See *Attorney General's Manual on the Administrative Procedure Act*, p. 13, n. 5, p. 30, n. 3 (1947); 92 Cong. Rec. 5650 (Rep. Walter) (Leg. Hist. of the APA, p. 357).

[26] The Board's *Excelsior* requirement is applicable "in all election cases" (A. 17), with one limited exception (see note 28, *infra*). Moreover, the Regional Director is required to make the information disclosed available "to all parties in the case" (*ibid.*), not just to contesting unions. As the dissenting judge pointed out, "the Excelsior rule by its terms applies to 'all parties'—which include employees hostile to a new union or seeking decertification of an old one" (A. 116). Similarly, the majority of the court below referred to the Board's concern for the access of unions "and anti-union employees" to the names and addresses of employees (A. 110).

and (2) to permit advance checks on the identity of the eligible voters and thus speed the election processes by reducing the number of callenges requiring post-election investigation and resolution (A. 17–18, 21–22). See *National Labor Relations Board* v. *Rohlen, supra,* 385 F. 2d at 55.[27]

The court below acknowledged that requiring production of the *Excelsior* list for the second purpose—*i.e.*, "superintending or checking the voters"—would be a procedural regulation (A. 113). However, it held that the *Excelsior* requirement really served only the first purpose; and that the rule was thus substantive since it required "the employer to furnish interested parties with affirmative assistance in conducting their election campaigns" (*ibid.*). The court's reasons for discounting the second purpose of the rule are at least dubious.[28]

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[27] See also *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 331.

[28] The court concluded that the list would not facilitate settlement of issues of voting eligibility because the Board "already had a valid rule requiring the employer to furnish a checklist" of the names of eligible voters shortly before an election, and the *Excelsior* rule merely added the requirements of early filing and the inclusion of employee addresses (A. 113). In addition, the court noted that the rule expressly does not apply to the unusual expedited election, conducted pursuant to Section 8(b)(7)(C) of the Act, where the time interval is "too brief * * * for the union to be able to make any meaningful use of his information" (A. 113, quoting from *Excelsior*, A. 20, n. 14).

The Board in *Excelsior* frankly stated that the primary purpose of the rule is "to insure an informed electorate," and noted that it had previously required employees to file a voting eligibility list (without employee addresses, however) prior to the conducting of elections (A. 21). However, contrary to the

In any event, as the dissenting judge noted, the burden on the employer "in being compelled to furnish addresses of employees is inconsequential" (A. 115).[29] It is not comparable, as the court below concluded, to requiring an employer to make an assembly hall or a printing press available to groups requesting it (A. 113). Rather, the requirement is analogous to the provision in the Board's Statements of Procedure that elections "be adequately publicized by the posting of official notices in the [employer's] establishment" (29 C.F.R. 101.19, 101.21(b)), or to the previous requirement that the employer furnish a checklist of the eligible voters' names shortly before the election (see note 28, *supra*).[30] Like those requirements, the *Excel-*

court below, the Board also regarded the rule as serving the independent purpose of permitting unions to check the eligibility of voters in advance and so "eliminate the necessity for challenges based solely on lack of knowledge of the voter's identity" (A. 22). Furthermore, the Board concluded that "*bona fide* disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significance of a single vote is apt to loom large in the parties' calculations" (A. 22). These purposes are "uncontrovertedly procedural" (A. 115, n. 4).

[29] In the nature of things, the employer simply happens to be the best source for the employees' names and addresses, but they are in no proper respect his "secret". The employer's interest in maintaining a monopoly on effective opportunities for communication with the employees prior to the election cannot properly be termed a "substantive right" (A. 22, 116).

[30] The Board's Statements of Procedure (29 C.F.R. 101.17-101.19) impose many requirements on election participants. Employers may be required to submit jurisdictional data. Individuals or labor organizations filing petitions for representa-

sior rule makes minimal demands on the employer, and like them, it promotes election participation and facilitates resolution of issues of voter eligibility. Accordingly, it should be viewed as procedural, no less than these analogous rules are so regarded.

Contrary to the court's suggestion, the *Excelsior* requirement is not substantive because it assists non-employer parties to conduct their election campaigns by providing them with greater access to the electorate (A. 113). The basic purpose of the requirement is to establish a more democratic election procedure, by encouraging fair and full communication of the issues and thereby increasing the likelihood of an informed employee electorate (A. 18, 21). That the *Excelsior* requirement may, as an incident of achieving this purpose, benefit election participants who previously had no effective means of reaching the voters, does not transform it into a substantive rule. "Of course all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one." *Ranger* v. *Federal Communications Commission*, 294 F. 2d 240, 244 (C.A.D.C.).

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tion or decertification must supply evidence that the petition is currently supported by at least 30 percent of the employees in the unit (29 C.F.R. 101.18(a)). Petitioning employers must produce evidence that the union named is seeking recognition; or, if the union is an incumbent, the employer must supply "a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost majority status" (29 C.F.R. 101.17). Once an election is directed, arrangements for the mechanics of conducting the election must be made, observers chosen, and the times and places for the balloting picked—all of which require the cooperation of the election participants (29 C.F.R. 101.19, 101.21(b)).

II. THE *EXCELSIOR* REQUIREMENT IS A VALID AND PROPER EXERCISE OF THE BOARD'S POWERS UNDER THE NATIONAL LABOR RELATIONS ACT[31]

Under Section 9(c)(1) of the National Labor Relations Act, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. See also *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226. The Board's *Excelsior* requirement is a reasonable exercise of that discretion. As has been indicated (*supra*, pp. 31–32), it serves the dual purpose of (1) giving employees voting in a representation election an effective opportunity to hear the arguments on all sides of the issue so that they will be in a better position to make an informed and reasoned choice, and (2) reducing the number of challenged ballots and simplifying representation proceedings by promoting advance settlement of questions of voting eligibility and by obviating the need for union challenges based solely on ignorance of the voter's identity.

Since open access to voter lists is universally recognized as consistent with the democratic process, the Board's adoption of a rule requiring employers to

[31] As noted previously, although the court below did not pass upon the substantive validity of the *Excelsior* requirement, five other courts of appeals have upheld it (*supra*, p. 6). Since respondent is likely to contest its validity on the merits as an alternative ground for upholding the judgment below (see note 5 *supra*), we discuss the question.

file such lists is "therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives" (*National Labor Relations Board* v. *A. J. Tower Co.*, *supra*, 329 U.S. at 332).[32] Moreover, the five courts of appeals which have considered the question have held, and even the court below strongly suggested, that the *Excelsior* requirement is a proper exercise of the Board's statutory authority (see *supra*, p. 6)

1. The Company contends (Resp. Br., pp. 12–15) that, under the decisions of this Court in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 and *National Labor Relations Board* v. *United Steelworkers* (*Nutone, Inc.*), 357 U.S. 357, the Board's authority to compel disclosure of employees' names and addresses is limited to cases where unions have no alternative means of communicating with the employees.[33] But both *Babcock* and *Nutone* dealt with the circumstances under which an employer commits an unfair labor practice, in violation of Section 8 of

[32] See also Bok, *The Regulation of Campaign Tactics in Representation Election Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 99–100 (1964), which states: "Since the opportunity for both sides to reach all employees is basic to a fair and informed election, the reasons for requiring disclosure seem just as strong as those leading to similar requirements under other provisions of the law."

[33] The Board in *Excelsior*, although acknowledging that, in some cases, "a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses," concluded "that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters" (A. 18).

the Act, by denying his employees access to union communications. As the Board noted in *Excelsior* (A. 25), the resolution of that issue depends on different considerations than those presented in determining the reasonableness of an employee-list rule for purposes of an election conducted under Section 9. As the Board further pointed out, "The existence of alternative channels of communication is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest—such as the employer's interest in controlling the use of the property owned by him" (A. 24).

Here, unlike in *Babcock* and *Nutone,* there is no necessity to balance, for "the employer has no significant interest in the secrecy of employee names and addresses" (*ibid.*). Moreover, the Board expressly stated that it was not, in *Excelsior,* considering or determining the question whether an employer's failure to provide an employee list would constitute an unfair labor practice under Section 8(a)(1) (A. 25–26; see A. 117–118).

2. The Company further contends (Resp. Br., pp. 9–11) that the *Excelsior* requirement invades the privacy of the potential voters in a representation election. But employees are not compelled to read union literature mailed to them, or to discuss the union with fellow employees or union representatives who might come to their homes for that purpose. Nor is it reasonable to assume that a union seeking to obtain employees' votes in a secret ballot election would engage in acts of harassment and coercion at their homes

(*National Labor Relations Board* v. *Hanes Hosiery Division*, *supra*, 384 F. 2d at 191). And if such conduct should occur in a particular case, the Board can provide an appropriate remedy (A. 23). Moreover, it is at least doubtful that the Company is in a position, as a matter of standing, properly to assert an alleged violation of employee privacy as a reason for the invalidation of the rule (see A. 24).

3. The Company also argues (Resp. Br., pp. 17–18) that unions already enjoy organizational advantages which employers lack, and the *Excelsior* requirement only adds to this imbalance. However, this argument overlooks that: (a) employers have a special relation to their employees which may make conduct by them coercive that would not be if engaged in by a union or other non-employer party;[34] and (b) as the Board noted, "employers are free to communicate with their

[34] Accordingly, the Board will set aside elections, on proper objection, where the employer has visited a significant number of employees in their homes prior to the election, because (1) his control of the employment relationship imparts a coercive effect to such systematic individual interviews, and (2) he has ample opportunity to address the employees in assembled or informal groups at work. Unions, on the other hand, not only "have more need to seek out individual employees to present their views, but, more important, lack the relationship with the employees to interfere with their choice of representative thereby." *Plant City Welding & Tank Co.*, 119 NLRB 131, 133–134. See *National Labor Relations Board* v. *Wolverine Industries Division*, 64 LRRM 2060, 2061 (E.D. Mich.), which notes that an employee is free to "turn his back" on union campaigners if he chooses, but, of "course, he can't turn his back to the boss if the boss comes to the home. Not if he is in his right mind, he can't."

employees in the plant; a union, as a practical matter, is severely limited in its efforts at in plant communications" (A. 27, n. 27; see A. 18).

4. The requirement that information be furnished to the Board, which the Board will then pass along to contesting unions and other interested parties in a representation proceeding (see note 26, *supra*), does not violate Section 8(a)(2) of the Act, which makes it an unfair labor practice for an employer to "contribute financial or other support to" a labor organization (A. 110). See *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 230–231; *Kimbrell* v. *National Labor Relations Board*, 290 F. 2d 799, 802 (C.A. 4); *Perry Coal Co.* v. *National Labor Relations Board*, 284 F. 2d 910, 912, 913 (C.A. 7), certiorari denied, 366 U.S. 949; *Morgantown Full Fashioned Hosiery Co.*, 107 NLRB 1534–1535.[35] Similarly without substance is the contention (Resp. Br., pp. 21–25) that compelling an employer so to provide a list of names and addresses forces that company to give a "thing of value" to a labor organization, in violation of Section 302 of the Act (29 U.S.C. 186). As the district court noted, such a construction is "patently contrary to the intent of congress in enacting the statute" (A. 196). See *Zentner* v. *American Federa-*

[35] The cases cited by the Company (Resp. Br., p. 19) do not hold to the contrary. In those cases, the employer furnished the employees' names and addresses to only one of two competing unions or groups, in an effort to influence the employees to select or retain the representative whom he favored.

tion of Musicians, 237 F. Supp. 457, 462–463 (S.D. N.Y.), affirmed, 343 F. 2d 758 (C.A. 2).[36]

In sum, none of the Company's arguments invalidates the Board's *Excelsior* requirement. That requirement is "a valid exercise of the Board's power to ensure employees a fair and free choice in the selection of their representative." *Howell Refining Co. v. National Labor Relations Board, supra*, 400 F. 2d at 216.

III. THE BOARD MAY ENFORCE THE *EXCELSIOR* REQUIREMENT THROUGH APPROPRIATE PROCEEDINGS IN A FEDERAL DISTRICT COURT

A. THE BOARD MAY COMPEL PRODUCTION OF THE EMPLOYEES' NAMES AND ADDRESSES THROUGH A SUBPOENA ENFORCEMENT PROCEEDING IN THE DISTRICT COURT, UNDER SECTION 11(2) OF THE ACT

Section 11(1) of the National Labor Relations Act provides that the Board shall have access to "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question," and empowers the Board to issue subpoenas "requiring the attendance and testi-

[36] See also *Arroyo* v. *United States*, 359 U.S. 419, 425–426, where it was stated: "Those members of Congress who supported the amendment [embodying Section 302] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power they might achieve if welfare funds were left to their sole control." In any event, Section 302 expressly does not apply "with respect to the payment or delivery of any * * * thing of value in satisfaction of a judgment of any court * * *" (Section 302(c)(2), 29 U.S.C. 186 (c)(2)).

mony of witnesses or the production of any evidence in such proceeding or investigation." Section 11(2) provides that, in case of refusal to obey a subpoena, the district courts shall have jurisdiction, upon application by the Board, to issue an order requiring the person subpoenaed "to appear before the Board * * * there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question * * *."

The entire representation proceeding conducted by the Board under Section 9 of the Act, from the filing of the petition to the certification of election results, is an "investigation". See *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 707. The basic aim of this investigation is to ascertain the wishes of the employees as to representation. As shown, the Board has reasonably concluded that making a list of employee names and addresses available to all election participants will further this purpose. Accordingly, employee lists are related to matters "under investigation or in question" in Section 9 representation proceedings.

However, the Company contends (Resp. Br., pp. 25–33) that, since the employee names and addresses will not be used by the Board to prove or disprove any fact in issue but will be made available to the contesting parties for electioneering purposes, such information cannot be regarded as "evidence" and hence is beyond the reach of the Board's subpoena power. The Company's construction of the term "evidence" as used in Section 11, we submit, is unduly restrictive. As the district court observed in this case (A. 104):

> Standard definitions of "evidence" * * * are not very helpful because the "something" at issue in this case is a group preference * * *. Also, the Board's function here is far from that of the traditional, passive fact finder. The Board is conducting an active representation investigation in which the regulation of an election is an integral part * * *.

Accordingly, that court concluded (A. 105):

> [I]n the context of § 11 of the Act, "evidence" means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation.[37]

Consistent with and confirming this view, the Board has long been permitted to subpoena employment and payroll records to compile a voter checklist when the employer refuses to supply one.[38] This information serves more than a conventional evidentiary purpose, since it aids the Board in (1) determining administratively whether the employees have a sufficient interest in union representation (or decertification) to war-

[37] Dissenting Judge Coffin accepted the Company's view, however, but held that the *Excelsior* requirement could be enforced by means of an injunctive suit (A. 117–118).

[38] See *National Labor Relations Board* v. *Cudahy Packing Co.*, 34 Supp. 53, 56 (D. Kan.), affirmed, 117 F. 2d 692, 693 (C.A. 10); *National Labor Relations Board* v. *Northern Trust Co.*, 56 F. Supp. 335, 336 (N.D. Ill.), affirmed, 148 F. 2d 24 (C.A. 7), certiorari denied, 326 U.S. 731; *National Labor Relations Board* v. *New England Transportation Co.*, 14 F. Supp. 497, 498, 499 (D. Conn.). See also the Board's brief in *National Labor Relations Board* v. *A. J. Tower Co.*, No. 60, 1946 Term, p. 37, n. 14: "We are not here concerned with the procedure followed where the employer refuses to supply such a list. Sometimes the Board subpoenas the payroll. * * *"

rant the holding of an election, (2) attempting to resolve any questions of voting eligibility by agreement of the parties shortly before the election, and (3) checking off the eligible voters as they appear at the polls to cast their ballots."[39]

The employee list that the *Excelsior* rule requires is similarly relevant and helpful to the Board in the conducting of a representation election. To be sure, like the voter checklist, it must be made available to all parties to the election if it is to perform its functions of assuring an informed electorate and of encouraging prior settlement of issues of voting eligibil-

[39] It may be argued that uses (1) and (2) fit the traditional definition of "evidence" in that they involve the Board's direct resolution of factual questions. More realistically, however, these uses simply help the Board to handle the mechanics of screening out frivolous petitions and of conducting elections in cases that survive the screening. Thus, the 30-percent showing of interest, involved in use (1) above, is not an issue subject to litigation by the parties. See *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 209 F. 2d 782, 786–788 (C.A. 7); *National Labor Relations Board* v. *J. I. Case Co.* 201 F. 2d 597, 598–599 (C.A. 9); Board's Statements of Procedure, Sec. 101.18(a) (29 C.F.R. 101.18(a)). It is merely a question that the Board asks itself in determining administratively whether the petitioner has a sufficient chance of winning to warrant the expenditure of government time, effort, and money in conducting a representation election. Similarly, with respect to use (2) above, the hope is that the parties, by checking and approving the list of eligible voters in a pre-election conference, will obviate the need for the Board to conduct challenge proceedings to determine issues of voting eligibility after the election. See Board's Statements of Procedure, Secs. 101.19(a) (1), 101.21(b) (29 C.F.R. 101.19(a), 101.21(b)). Accordingly, neither of these uses of the checklist qualifies it merely as "proof of a fact in issue" before the Board (A. 117).

ity.[40] But, although the parties may use the *Excelsior* list in an effort to achieve their own aims of winning over the voters, this is only incidental to the statutory goal of a more democratic election that is ultimately served by the requirement. Accordingly, just as the payroll and employment records used for the voter checklist are viewed as "evidence" for purposes of Section 11, even though their use is not confined to the conventional evidentiary purpose of proving or disproving a fact in issue, so the employee names and addresses required by *Excelsior* should be similarly regarded.

That Congress intended under Section 11 to give the Board access not only to evidence in a conventional sense, but to all information relevant to the performance of its functions under the Act, is confirmed by the preamble to that section. It provides that the subpoena powers enumerated therein shall be "for the purpose of hearings and investigations

[40] The propriety of disclosing subpoenaed information to aid an agency in carrying out its statutory responsibilities is well settled, in the absence of an overriding private interest in favor of confidentiality. See *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279; *National Labor Relations Board* v. *Friedman*, 352 F. 2d 545, 548 (C.A. 3). No such private interest is present here, for, as the Board noted in *Excelsior*: "A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election" (A. 22).

which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 * * *." The same intention is reflected in the pertinent Committee reports:[41]

> For the purpose of all hearings and investigations which in the opinion of the Board are necessary and proper for the exercise of the powers vested in it by section 9 and section 10, there is granted in section 11 the subpoena powers typically provided for similar administrative bodies without which their work would be ineffectual. The section grants no roving commission, but is limited to the exercise of powers and functions embodied in sections 9 and 10 * * *.[42]

Finally, the view that an administrative agency like the Board is vested with authority to subpoena all information relevant to the performance of its congressionally delegated functions is supported by this Court's decision in *United States* v. *Morton Salt Co.*,

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[41] See, *e.g.*, H. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess., p. 25 (II Leg. Hist. of the NLRA, p. 3076).

[42] See also Comparison of S. 2926 and S. 1958, Memorandum of March 11, 1935, 74th Cong., 1st Sess., p. 40 (I Leg. Hist. of the NLRA, p. 1367), noting that the provision in Section 11, granting the Board access to "evidence related to matters under investigation," was identical to provisions in the Federal Trade Commission Act, the Interstate Commerce Act, and the Communications Act, and that "similar" powers were granted to the Railway Labor Board ("the Board shall have access to * * * the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph"), and to the National Steel Board ("the Board shall have access to such payrolls and other documents as will enable the Board to prepare and certify lists of employees eligible to vote in elections").

338 U.S. 632.[45] There the Federal Trade Commission sought to require corporations to file reports showing how they had complied with a court decree enforcing a Commission cease-and-desist order. This Court upheld the Commission's power to compel such reports in the exercise of its statutory power to investigate compliance, stating (338 U.S. at 642):

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is

[45] See generally Note, *Resisting Enforcement of Administrative Subpoenas Duces Tecum*, 69 Yale L.J. 131, 133 (1959); Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 Mich. L. Rev. 187, 189–190 (1961); Note, *Use of Contempt Power to Enforce Subpenas and Orders of Administrative Agencies*, 71 Harv. L. Rev. 1541, 1543 (1958). The more restrictive view of an administrative agency's subpoena powers expressed in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, has been modified by the subsequent decisions of this Court, such as *Morton Salt*. See also *National Labor Relations Board* v. *Rohlen*, *supra*, 385 F. 2d at 58; 1 Davis, *supra*, p. 163, Sec. 3.02; and the law review commentaries cited above. In any event, *American Tobacco* does not support the view, attributed to it by the respondent below, that the term "evidence" is to be given a technical construction in statutory grants of administrative subpoena power; rather, that case involved a construction of the term "relevant"—an issue not presented here. See also comparison of S. 2926 and S. 1958, Memorandum of March 11, 1935, *supra*, p. 41 (I Leg. Hist. of the NLRA, p. 1369), referring to the "very restrictive" construction given the phrase "documentary evidence" in *American Tobacco*, and concluding that the term "evidence" should be used in the National Labor Relations Act to guarantee the Board access to records "such as pay rolls, which the Board would have most need of."

> shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. * * *

See also *United States* v. *Powell*, 379 U.S. 48, 53–54.

Significantly, the four courts of appeals which have reached the question have construed the term "evidence", as used in Section 11 of the National Labor Relations Act, in a broad fashion to encompass any information relevant to the performance of the Board's statutory functions. They have therefore concluded that the *Excelsior* requirement may be enforced by means of a subpoena issued by the Board under that section, with resort to a district court available should compliance be refused. *National Labor Relations Board* v. *Rohlen*, 385 F. 2d 52, 55–58 (C.A. 7); *National Labor Relations Board* v. *Beech-Nut Life Savers, Inc.*, App. B, pp. 69–70 (C.A. 2); *British Auto Parts, Inc.* v. *National Labor Relations Board*, App. C, pp. 76–77 (C.A. 9); *National Labor Relations Board* v. *Hanes Hosiery Division*, 384 F. 2d 188, 191–192 (C.A. 4), certiorari denied, 390 U.S. 950."

" Moreover, even accepting a more restrictive definition of the term "evidence," the information sought by the Board here should be compellable under Section 11 of the Act. The ultimate question to be answered in the representation investigation conducted by the Board is whether an informed employee electorate will select a union as collective bargaining representative in a free and fair election. A list of the names and addresses of employees eligible to vote in the election, which is to be made available to all parties for the purpose of communicating election issues and determining eligible voters, is relevant to the res-

B. THE BOARD MAY COMPEL PRODUCTION OF THE EMPLOYEES' NAMES AND ADDRESSES IN A DISTRICT COURT SUIT FOR INJUNCTIVE RELIEF UNDER 28 U.S.C. 1337

Alternatively, production of a list of employees' names and addresses may be compelled through an injunctive suit under 28 U.S.C. 1337. That section provides that the district courts shall have jurisdiction of all suits and proceedings under any law regulating commerce. It has consistently been held that under this provision the district courts have power to grant injunctive relief to aid administrative agencies, operating under laws regulating commerce like the National Labor Relations Act, in carrying out their statutory functions—even though there is no express authorization for such relief in their respective enabling acts. See. *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U.S. 501, 504; *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511, 521–524, 526–527 (dissenting opinions); *National La-*

olution of that ultimate issue. As the Seventh Circuit concluded in *Rohlen*, *supra*, 385 F. 2d at 57:

> Even if we adopt the orthodox view that evidence tends to prove or disprove the existence of a disputed fact or something in issue, the "something in issue" in a representation proceeding under section 9 is the employee group-preference. An *Excelsior* list, by facilitating a fully informed electorate, is evidence which aids in the establishment of that group-preference.

Similarly, as stated in *British Auto Parts* (App. C, p. 77):

> [T]he addresses as well as the names of employees could properly be found by the Board to be information which would be facilitative of both the process and the object of a representation election, and so subject to demand as "evidence" in a practical application of that term to the nature and aspects of such a proceeding.

bor Relations Board v. *New York State Labor Relations Board,* 106 F. Supp. 749, 752–753 (S.D.N.Y.), and cases there cited; *Walling* v. *Brooklyn Braid Co.,* 152 F. 2d 938, 940–941 (C.A. 2); *Federal Maritime Commission* v. *Atlantic & Gulf/Panama Canal Zone,* 241 F. Supp. 766, 774–775 (S.D.N.Y.).

In this type of suit the question before the district court is "whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted." *Walling* v. *Brooklyn Braid Co., supra,* 152 F. 2d at 941. Moreover, the general equitable jurisdiction of the district courts extends to actions brought to carry out the public purpose despite the absence of any express authority, for "there is inherent in the Courts of Equity a jurisdiction to * * * give effect to the policy of the legislature." *Reich* v. *Webb,* 336 F. 2d 153, 158 (C.A. 9), certiorari denied, 380 U.S. 915, quoting from *Mitchell* v. *DeMario Jewelry,* 361 U.S. 288, 291–292. See also *International Ass'n of Machinists* v. *Central Airlines Inc.,* 372 U.S. 682, 690–696; *Texas & New Orleans R.R. Co.* v. *Railway Clerks,* 281 U.S. 548, 569–570; *Shafer* v. *United States,* 229 F. 2d 124, 128 (C.A. 4), affirming 132 F. Supp. 659, 669 (D. Md.), certiorari denied, 351 U.S. 931; *United States* v. *Feaster,* 330 F. 2d 671, 674, and 376 F. 2d 147, 148–149 (C.A. 5), certiorari denied, 389 U.S. 920. As dissenting Judge Coffin here concluded (A. 118), this test is satisfied with respect to such enforcement of the *Excelsior* requirement.

Section 9(c) of the National Labor Relations Act authorizes the Board to establish the procedures and safeguards for the conducting of fair representation elections, and the *Excelsior* requirement was adopted pursuant to that authorization (*supra*, pp. 35–36). The aid of the district court may be necessary to make this exercise of the Board's statutory functions effective. Normally the Board itself enforces its election requirements by setting aside, on proper objection, elections in which a party has engaged in conduct that the Board finds destructive of a free and fair employee choice. When the effects of that conduct are deemed to be dissipated, a new election is held, and the party who initially engaged in the conduct usually has nothing much to gain by repeating it.

But, in the case of the *Excelsior* requirement, an employer may simply decide that he does not want to share with a union the advantages he has in communicating with his employees, and thus may adamantly refuse to furnish a list of their names and addresses to the Regional Director on a continuing basis. Accordingly, if the Board were remitted solely to the sanction of setting aside elections in which its rule had not been complied with, an employer's persistent non-compliance could block a valid election indefinitely, or delay it at will, in contravention of the congressional policy favoring the prompt resolution of questions of employee representation. See Note, *The Judicial Role in the Enforcement of the "Excelsior Rule"*, 66 Mich. L. Rev. 1292, 1297–1298 (1968).

It is no answer that the Board could enforce its *Excelsior* rule by finding the refusal to comply with

the employee-list requirement a violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their statutory rights (see A. 117–118). Although the Board has not yet determined whether a failure to comply with the *Excelsior* requirement would violate Section 8(a)(1), and specifically found it unnecessary to do so here (A. 25–26), it is well settled that conduct which may interfere with the "laboratory conditions" desirable for an employee election need not amount to interference, restraint, and coercion within the meaning of Section 8(a)(1).[46] Moreover, since the Board's power to regulate elections under Section 9 of the Act is independent of its authority to remedy unfair labor practices under Section 10, its ability to enforce an election rule like that adopted in the *Excelsior* case should not be dependent on finding non-compliance therewith to be an unfair labor practice.

[46] See *General Shoe Corp.*, 77 NLRB 124, 126, where the Board stated:

> "When we are asked to invalidate elections held under our auspices, our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative" [quoting *R. D. Gwaltney*, 74 NLRB 371, 373]. Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free untrammeled choice for or against a bargaining representative. * * *

See also *National Labor Relations Board* v. *Shirlington Supermarket*, 224 F. 2d 649, 652 (C.A. 4), certiorari denied, 350 U.S. 914.

Neither *Leedom* v. *Kyne*, 358 U.S. 184, nor *Boire* v. *Greyhound Corp.*, 376 U.S. 473, militates against equitable relief in cases like the instant one. Both of those cases involved attempts to obtain direct review of Board orders in representations proceedings of the kind that ordinarily were not reviewable at that stage of the proceeding. In *Leedom*, the Court, although sustaining the exercise of district court jurisdiction, limited it to a situation where the Board has acted "contrary to a specific prohibition in the Act" and where "'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given" (358 U.S. at 188, 190). It did so because the legislative history of the National Labor Relations Act demonstrated that "Congress knew that if direct judicial review of the Board's investigation and certification of [bargaining] representatives was not barred, 'the Government [could] be delayed indefinitely before it [took] the first step toward industrial peace'" (358 U.S. at 192, 194) (dissenting opinion). And the Court simply confirmed the limited holding of *Kyne in Boire* v. *Greyhound*, *supra*, 376 U.S. at 480–481.

Here the situation is entirely different. Intervention by a district court to enforce the *Excelsior* requirement, if necessary, would aid, rather than subvert, the congressional policy that questions of representation be promptly resolved under the procedures adopted by the Board for conducting fair and free employee elections. Cf. *United States* v. *Feaster*, *supra*, 376 F. 2d at 148–149, 150–151, nn. 1, 2, and 4.

Accordingly, the district courts have authority, under 28 U.S.C. 1337, to issue mandatory injunctions in such situations.

CONCLUSION

The judgment of the court of appeals dismissing the Board's complaint should be reversed, and the case should be remanded to the court of appeals with directions either to affirm the judgment of the district court enforcing the subpoena or to remand the case of the district court for the entry of an appropriate injunction.

Respectfully submitted.

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JANUARY 1969.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.
>
> * * * * *
>
> SEC. 9(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative as defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted

by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

SEC. 10(b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States * * *.

(c). The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may

take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * * *

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose pro-

duction is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

* * * * * *

SEC. 14(c)(1). The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standard prevailing upon August 1, 1959.

2. The relevant provisions of the Administrative Procedure Act, as amended (60 Stat. 237, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551, *et seq.*) are as follows:

SEC. 552. PUBLIC INFORMATION * * *

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— * * *

* * * * *

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *

* * * * *

SEC. 553. RULE MAKING

* * * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Argued April 10, 1968 Decided December 3, 1968.)

Docket No. 32002

NATIONAL LABOR RELATIONS BOARD,
PETITIONER-APPELLEE

v.

BEECH-NUT LIFE SAVERS, INC., RESPONDENT-APPELLANT

Before LUMBARD, CHIEF JUDGE,
WATERMAN and KAUFMAN, CIRCUIT JUDGES

WATERMAN, *Circuit Judge*:

This case is here on appeal from a final judgment order of the United States District Court for the Southern District of New York granting the National Labor Relations Board's application for enforcement of a subpoena *duces tecum* directed to appellant Beech-Nut Life Savers, Inc. pursuant to Section 11(2) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. §§ 151 et seq.). The district court's opinion is reported at 274 F. Supp. 432. The jurisdiction of this court is invoked under 28 U.S.C. §§ 1291 and 1294.

On February 18, 1966, Office & Professional Employees International Union, Salesmen's Division,

Local 153, AFL-CIO (Local 153), petitioned the Board for a representation election to be held among certain of the appellant's salesmen. Two other unions, District 65, Retail, Wholesale and Department Store Union, AFL-CIO, and Joint Organizing Committee of Locals 342, 400, 467, 474, and 489, Amalgamated Meat Cutters & Food Employees Union, AFL-CIO, intervened in the proceeding. The Regional Director for Region 2, New York City, on April 14, 1966, ordered that an election by secret ballot be conducted among the affected salesmen of appellant. In his Direction of Election the Regional Director ordered appellant, among other things, to comply with the rule announced by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

The Board's *Excelsior* rule requires an employer to file with the Board's Regional Director a list of the names and addresses of all employees eligible to vote in a representation election within 7 days after the Director's direction of an election or after the close of a payroll period determinative for eligibility purposes, whichever is later. This list is made available to all parties participating in the representation proceeding in order to facilitate the communication of election issues to the employees and the prompt resolution of questions relating to the voting eligibility of particular employees. The *Excelsior* rule also provides that an employer's failure to file the required list is ground for setting the election aside whenever proper objections to the election are filed.

Appellant failed to file the *Excelsior* list. On July 20, 1966, one day before the scheduled election, the company submitted a list of names of the voters but without addresses.

On July 21, 1966, an election was conducted in which 88 votes were cast for local 153, 3 votes for one

of the intervening unions, no votes for the other intervening union, and 135 votes against representation by any union. Local 153 filed objections to the election because appellant had not complied with the *Excelsior* rule.

The Regional Director sustained the Local's objections, set aside the election, and ordered a second election. Appellant maintained that the July 21 election was a valid one, attacked the validity of the *Excelsior* rule and the impropriety of the Board's insistence upon compliance with the Rule in this representation proceeding. In the meantime the two intervening unions were permitted to withdraw from participation in the second election.

On November 29, 1966, the Regional Director issued a Notice of Rerun Election and notified the Company by letter that it had until December 7, 1966 to submit an *Excelsior* list. In a letter dated December 5, 1966 appellant refused to supply the *Excelsior* list. Because of appellant's continued refusal to furnish an *Excelsior* list, the second election was indefinitely postponed by the Regional Director.

On December 13, 1966, the Regional Director caused a subpoena *duces tecum* to be issued, pursuant to Section 11(2) of the Act, directing the appellant to produce and make available to the Board's Regional Office the appellant's personnel payroll records or, in lieu thereof, a list containing the names and addresses of all employees eligible to vote in the election. The appellant refused to comply with the subpoena or otherwise furnish the list and petitioned to have the subpoena revoked. The Board denied appellant's petition and applied in the district court for enforcement of the subpoena, or, alternatively, for a mandatory injunction directing the appellant to comply with the *Excelsior* rule. Jurisdiction was based on Sections 11

(2) and 9(c) of the National Labor Relations Act, and on 28 U.S.C. § 1337. The district court upheld the *Excelsior* rule, refused to review the validity of the first election and entered judgment on November 1, 1967. It granted enforcement of the Board's subpoena. It also ordered that the appellant should, within seven days of the receipt of a notice from the Regional Director that a second election was to be held, forward the subpoenaed information to the Director. The court found it unnecessary to issue the alternatively requested mandatory injunction. This appeal followed.

Appellant's main contention is that the Board's *Excelsior* rule, regardless of whether the rule is a desirable or an undesirable one, is invalid and unenforceable because it was not promulgated in the manner required by the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551–553. This contention is supported by two separate arguments. Appellant's first argument is that rules of general applicability and future effect, 5 U.S.C. § 551(4), such as the *Excelsior* rule, can only be promulgated after *quasi-legislative* agency proceedings which conform with the Administrative Procedure Act's provisions dealing with *quasi-legislative* agency rule-making, 5 U.S.C. §§ 551–553; and, that only "orders," 5 U.S.C. § 551(6), which are applied to the particular case before the agency can be formulated in *quasi-judicial* agency proceedings. 5 U.S.C. § 551(7). Appellant's second argument is that, even if rules of general applicability and future effect can be formulated in the course of a *quasi-judicial* agency proceeding, the agency must be adjudicating the rights of parties before the agency when the rules are formulated, and that this was not the situation when the *Excelsior* rule was announced in *Excelsior Underwear, Inc., supra.* We do not agree with appellant's analysis or with its arguments.

Appellant's first position is grounded upon too narrow an interpretation of the range of powers given to the Board and of the regulations governing the manner in which the powers delegated to it may be exercised. Basically, the Board has the authority to use either of two procedures in dealing with the specialized problems it encounters in the administration of federal labor laws. The Board can resolve a problem arising within its limited jurisdictional sphere either by quasi-legislative promulgation of general rules designed to meet the problem, National Labor Relations Act § 6, 29 U.S.C. § 156; 5 U.S.C. § 551–553; or in quasi-judicial proceedings when the problem arises as an issue in a case before the Board, National Labor Relations Act § 6, 29 U.S.C. § 156; 5 U.S.C. §§ 554, 556, 557. The procedure it chooses to follow in resolving any particular problem is a matter for the Board, in its informed judgment, to decide. E.g., *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202–03 (1947); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *NLRB* v. *Penn Cork and Closures, Inc.*, 376 F. 2d 52, 57 (2 Cir. 1967); *NLRB* v. *A.P.W. Products Co.*, 316 F. 2d 899 (2 Cir. 1963).[1]

[1] The NLRB has been criticized in the past both by this court, see e.g., *NLRB* v. *Majestic Weaving Co.*, 355 F. 2d 854 (2 Cir. 1966); *NLRB* v. *Penn Cork and Closures, Inc.*, 376 F. 2d 52 (2 Cir. 1967), and by legal commentators, see, e.g., 1 Davis, Administrative Law Treatise § 6.13 at 149 (1967 Supp.); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729, 752–761; Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965), because the Board has not fully utilized its *quasi-legislative* rule-making powers to their full advantage. However, regardless of the fact that the courts and the commentators would prefer to see the Board employ *quasi-legislative* procedures more often than it has, the Board has not seen fit to proceed in this manner.

Strictly construed, the Administrative Procedure Act could be interpreted as limiting all agency rule making to quasi-legislative proceedings. However, we do not believe Congress intended that the Act should be so strictly construed. Congress, in giving the National Labor Relations Board quasi-judicial powers, "cannot have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to 'rules,' which may apply for the past for the future, or, more generally, for both . . ." *NLRB* v. *A.P.W. Products Co., supra* at 905; see *Wyman-Gordon Co.* v. *NLRB,* 397 F. 2d 394 (1 Cir. 1968), cert. granted, 37 L. W. 3177 (U. S. Nov. 12, 1968); *cf.* National Labor Relations Act §14(c)(1), 29 U. S. C. §164 (c)(1).[2] Therefore we hold that either of the congressionally authorized proceedings can be a proper source of Board rules having general applicability and future effect.

Appellant's second argument, that the Board was not adjudicating the rights of the parties before the Board when it announced the *Excelsior* rule, is supported by a recent First Circuit decision. In *Wyman-Gordon Co.* v. *NLRB,* 397 F. 2d 394 (1 Cir. 1968), the First Circuit held that the *Excelsior* rule was not properly promulgated in the course of an adjudicatory proceeding and consequently was promulgated in violation of the Administrative Procedure Act. With

[2] Over the years a great many rules have been formulated and applied by the Board in its *quasi-judicial* proceedings. E.g., *Brooks* v. *NLRB*, 348 U. S. 96 (1954); *NLRB* v. *Auto Ventshade, Inc.*, 276 F. 2d 303 (5 Cir. 1960); *NLRB* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (4 Cir. 1959), cert. denied, 381 U. S. 943 (1960); *Peerless Plywood*, 107 NLRB 427 (1953).

all due respect, we do not agree with the First Circuit.[3]

If the *Excelsior* rule had been tacked onto an opinion dealing with completely unrelated facts and issues we would be inclined to agree with the First Circuit. This was not the situation in *Excelsior*, however. In *Excelsior*, the Union, after losing a Board-directed election, filed timely objections to certain pre-election employer conduct. One objection was that the employer refused to supply a list of names and addresses of its employees. *Excelsior Underwear, Inc., supra* at 1236. The Board considered this objection and the arguments made with reference to it and in the course of its decision announced the *Excelsior* rule which was to be applied to all future representation election cases. *Excelsior Underwear, Inc., supra* at 1239. Out of considerations of fairness the Board decided not to apply the new election rule to *Excelsior Underwear, Inc., supra* at 1240, n. 5, and the union's objection was overruled. Clearly the rule announced in *Excelsior* was substantially based on the facts and issues of that case.

It is true that the new rule extended beyond the immediate facts of the *Excelsior* case and was designed to be applicable to all future representation elections, but this is not a fatal defect. On the contrary, the Board in devising a rule is not limited to the particular facts of the case presented to it for adjudication. Cf. *NLRB* v. *Seven-Up Bottling Co., supra* at 348-349. Effective administration of our federal labor laws and the sound resolution of conflicts arising in the course of administering those laws de-

[3] The Fifth Circuit in a recent decision, *Howell Refining Co.* v. *NLRB*, —— F. 2d —— (5 Cir. 1968), has also declined to follow the First Circuit's *Excelsior* ruling in *Wyman-Gordon Co.* v. *NLRB*, 397 F. 2d 394 (1 Cir. 1968).

mand that the Board bring all its accumulated knowledge and experience to bear on any problem before announcing a rule designed to deal with that problem.

This second argument of appellant in support of its main contention, that the rule was not one which could be properly promulgated in a *quasi-judicial* proceeding, because it was not applied to the parties in the *Excelsior* case and only applied prospectively, is, as is its first argument, without merit. The National Labor Relations Board, like other agencies with *quasi-judicial* powers, has the power to determine that a rule change be prospective if the Board feels that fairness to the parties before it demands that this approach be followed. See *NLRB* v. *E & B Brewing Co.*, 276 F. 2d 594 (6 Cir. 1960), *cert. denied*, 360 U.S. 908 (1961); cf. *Rockwell Mfg. Co., Kearney Division* v. *NLRB*, 330 F. 2d 795 (7 Cir.), *cert. denied*, 379 U.S. 890 (1964); *Optical Workers' Union* v. *NLRB*, 227 F. 2d 687 (5 Cir. 1955). There is nothing anomalous about a prospective change in a legal rule occurring in an adjudicatory setting. In all fairness sufficient time may be required to permit persons to change systems and modes of dealing with one another. See *Safarik* v. *Udall*, 304 F. 2d 944, 949–950, n. 4 and n. 5 (D.C. Cir. 1962).

Therefore we hold that the *Excelsior* rule was not adopted in violation of the requirements of the Administrative Procedure Act.

Additionally, appellant attacks the *Excelsior* rule as being an abuse of the supervisory powers of the Board over representation elections. We find nothing in the contentions appellant advances which have not been fully and carefully considered and properly rejected either by the Board in *Excelsior Underwear, Inc., supra*, or the courts which have had occasion to

examine the *Excelsior* rule. *NLRB* v. *Rohlen,* 385 F. 2d 52, 55, n. 2 (7 Cir. 1967); *NLRB* v. *Hanes Hosiery Division, Hanes Corp.,* 384 F. 2d 188 (4 Cir. 1967), *cert. denied,* —— U.S. ——, 88 S. Ct. 1041 (1968). There is no need to reiterate the Board's and the courts' well articulated discussions which are more than adequate to dispose of these contentions.

Appellant also maintains that the district court erred in enforcing the subpoena requested by the Board for, first, the subpoena does not call for the production of "evidence" or "testimony" as required by the National Labor Relations Act. National Labor Relations Act § 11; U.S.C. § 161 (1964).[4] We do not agree.

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[4] 29 U.S.C. § 161(1) reads:

§ 161. Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

Documentary evidence; summoning witnesses and taking testimony

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation,

The term "evidence," as used in this section of the National Labor Relations Act, has not been limited to formal proof of disputed facts presented in a trial-type hearing. Rather, it has been construed by the courts so as to permit the Board to subpoena data which is relevant and helpful to a matter "under investigation" or "in question." E.g., *NLRB* v. *Rohlen, supra* at 55–58; *NLRB* v. *Hanes Hosiery Division, Hanes Corp., supra;* but see, e.g., *NLRB* v. *Q-T Shoe Co.,* 279 F. Supp. 1 (D.N.J. 1968); see generally, Note, *The Judicial Role in the Enforcement of the "Excelsior Rule,"* 66 Mich. L. Rev. 1292 (1968). The *Excelsior* rule and the subpoenas issued in aid of the rule are designed to assist the Board in fulfilling its statutory duties to investigate questions of representation and to supervise representation elections. E.g., *NLRB* v. *Rohlen, supra; NLRB* v. *Hanes Hosiery Division, Hanes Corp., supra; Excelsior Underwear, Inc., supra.* The district court's enforcement of the Board issued subpoena was entirely proper.

Second, appellant contends that, although there had not been exact compliance with the *Excelsior* rule, there had been substantial compliance with the policies underlying it. This contention is based on the alleged fact that the unions, at the time of the challenged election, had a list of the names and addresses of all eli-

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or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

gible employees.[5] Therefore, the appellant argues that the first election was valid, that it was improper for the Board to set aside the first election on the ground that the appellant did not comply with the *Excelsior* rule, and that it was error for the district court to enforce the Board-issued subpoena which was to be used in the allegedly improperly directed rerun election.

On the ground that it lacked jurisdiction to do so, the district court refused to review the action of the Board in setting aside the first election, see, *Boire* v. *Greyhound,* 376 U.S. 477 (1964). Assuming, though not deciding, that the district court did have jurisdiction to review that action of the Board, there surely was no compliance by the employer with the *Excelsior* rule. An employer-furnished list supplied the day before an election does not provide adequate time for fair scrutiny and appraisal. Even if Local 153 had timely obtained a list of employee names and addresses from sources other than appellant, such a list does not carry the same assurance of accuracy and completeness as a list obtained by an employer from the employment records. *Excelsior Underwear, Inc., supra.* Accuracy, completeness, and opportunity for scrutiny all are necessary if the policies underlying the *Excelsior* rule are to be fulfilled.

Ignoring the fact that the list appellant furnished, whether accurate or inaccurate, was not supplied within the seven day period required by the *Excelsior* rule, appellant argues that if there is any doubt as to the completeness and accuracy of the list of employees in the unions' possession the Board should have held an

[5] Apparently Local 153 sent out literature to employees in which it was stated that it had a list of names and addresses of the salesmen in all of the districts comprising the bargaining unit. This list was obtained, according to Local 153, from salesmen in the unit.

evidentiary hearing directed to such an inquiry before issuing an order for a rerun election. This argument is without merit. The *Excelsior* rule was designed to expedite representation elections. To force the Board to hold an evidentiary hearing each time an employer refused to supply an *Excelsior* list because the employer claimed that the union had obtained the necessary names from other sources would only impede the representation election process.

We hold that the district court committed no error in enforcing the Board-issued subpoena.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRITISH AUTO PARTS, INC., APPELLANT

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

No. 21,883

Appeal from the United States District Court for the Central District of California

TELEDYNE, INC., APPELLANT

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

No. 22,354

Appeal from the United States District Court for the Northern District of California

(December 17, 1968)

Before JOHNSEN,* BROWNING and CARTER, *Circuit Judges.*

PER CURIAM. These two appeals are from orders of different district courts enforcing subpoenas against employers issued by the National Labor Relations Board

*Harvey M. Johnsen, Senior Circuit Judge of the Eighth Circuit, sitting by designation.

to provide the Board's Regional Office with the addresses (in addition to the names) of the employees eligible to vote in the representation elections which had been set for the respective plants. The basis for the demand was in both cases the holding and requirement of the Board's decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

We can see no need to engage in further judicial discourse on the contentions made as to the unreasonableness and unfairness of an employer's being required to provide the addresses of his employees for use in a representation election, and further of his being thereby also forced to breach actual or presumable confidence in respect to employees' home privacy. These questions have had sufficient answer by decisions of two courts of appeal—with which we agree—*N.L.R.B.* v. *HAYNES HOSIERY DIVISION*, 384 F. 2d 188 (4 Cir. 1967), cert. denied 390 U.S. 950, 88 S. Ct 1041, 19 L. Ed. 2d 1141, and *N.L.R.B.* v. *ROHLEN*, 385 F. 2d 52 (7 Cir. 1967).

We accordingly merely note our approval of the findings and conclusions related to these contentions made by Judge Hill in the *British Auto Parts* case, 266 F. Supp. 368 (C.D. Cal.), and those made by Judge Weigel in the *Teledyne* case (N.D. Cal.), [not published in F. Supp.].

We further regard as not possessing merit the challenge made beyond this to the right of the Board to use its *Excelsior* decision as a basis for imposing such an address requirement in the situations. This attack is predicated on the holding in *Wyman-Gordon Co.* v. *N.L.R.B.*, 397 F. 2d 394 (1 Cir. 1968), with which we are unable to agree, rendered by a divided court since the time of the orders of the district courts herein.

In substance the position taken by the majority in *Wyman-Gordon* and by each of appellants here is that the address requirement of the *Excelsior* decision cannot be accorded the status of a decisional or adjudicative rule; that it was not made applicable to the parties involved or the disposition effected in that controversy; that it thus constituted merely a prescription for future election situations and so amounted only to the promulgation of a general administrative rule; that the Board however was not at liberty to adopt and place in effect such an administrative prescription except upon a compliance by it with the procedural specifications of 5 U.S.C.A. §§ 1002, 1003 (now §§ 552, 553) of the Administrative Procedure Act; and that the *Excelsior* rule could accordingly not be so utilized by the Board.

But the question whether an employer could at all or should be required to provide the addresses of his employees for purposes of a representation election was a salient issue in the *Excelsior* controversy. It was one upon which briefs were requested to be filed and oral argument was directed to be made before the Board. Thus it manifestly constituted a matter that the Board was entitled to consider, rule upon, and resolve in the *Excelsior* proceeding—which it did as follows: "We are persuaded * * * that prompt disclosure of the information here sought by the Petitioners should be required in all representation elections. Accordingly, we now establish a requirement that will be applied in all election cases. * * *". To us it seems clear that this constituted finding, conclusion and order resting on decisional element and incident in the controversy before it and so inherently represented adjudicative process and result.

While the Board engaged in spelling out the nature and significance of its holding and the details of the

practical operation thereof, such facilitating implementation would not in our opinion nullify the decisional or adjudicative character and basis of what it had done. It would be only natural that, with its heavy burden of work, the Board would seek to leave no possibility for claims of confusion and misunderstanding, or (to repeat the language which it used in relation to one of the details) "to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated."

Further, we are not able to see how the fact that the Board chose not to make the decisional rule which it laid down controlling of its relief in the particular situation could alter the legal aspect or significance of its general adjudicative holding. We are not aware of any authority, other than the divisive holding in *Wyman-Gordon*, that a rule which has been laid down by an administrative tribunal on adjudicative element and process in a controversy before it is without force or effect as a decisional rule unless it is made to have application to the parties and to the relief of the immediate proceeding.

There remains the final contention that, even though the *Excelsior* rule be regarded as not invalid upon the foregoing bases, there exists no provision under either the National Labor Relations Act or the Judicial Code on which the Board can legally seek judicial enforcement of a subpoena issued in relation to it. As to this, we again agree with the holding of the Fourth Circuit in *Haynes Hosiery Division*, 385 F. 2d at 181, and that of the Seventh Circuit in *Kohlen*, 385 F. 2d at 57–58, as well as those of Judge Hill and Judge Weigel in the present cases, that such power and authority persuasively exist under the provisions of section 11(2) of the Act, 29 U.S.C. § 161(2).

The Board has been granted by that section the right to issue and have enforced subpoenas requiring persons "to produce evidence * * * or give testimony touching the matter under investigation or in question" before it. As held in *Rohlen,* 385 F. 2d at 57, a representation election inherently constitutes a "matter under investigation" from the filing of a petition or stipulation therefor, through the handling of all the incidents thereof, and until the termination of the proceedings. On this basis, the addresses as well as the names of employees could properly be found by the Board to be information which would be facilitative of both the process and the object of a representation election, and so subject to demand by it as "evidence" in a practical application of that term to the nature and aspects of such a proceeding.

With this holding, it is not necessary to consider whether jurisdiction to enforce the subpoenas involved would also coordinately or alternatively exist under the provisions of 28 U.S.C.A. § 1337 of the Judicial Code, conferring upon the district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *". We accordingly do not reach that question and so of course intend no intimation of any nature upon it.

The order of enforcement in each of the cases before us is affirmed.[1]

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[1] It may be noted that the Supreme Court has recently granted the Board's petition for certiorari in the *Wyman-Gordon* case, so that that case is accordingly now pending before it.

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In the Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 463.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

WYMAN-GORDON COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR WYMAN-GORDON COMPANY.

Opinions Below.

The opinion of the Court of Appeals (A. 109-118) is reported at 397 F. 2d 394 (Appendix, p. 49). The opinion of the District Court (A. 101-106) is reported at 270 F. Supp. 280. The decision of the Board's Regional Director, out of which the instant case arose (A. 9-11, 29-34), is not officially reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 12, 1968 (A. 119). The petition for a writ of certiorari was filed on August 30, 1968, and was granted on

November 12, 1968 (A. 120). The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

Statutes Involved.

The relevant statutes are the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and the Administrative Procedure Act, as amended (60 Stat. 257, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 *et seq.*).

Questions Presented.

(1) Whether the *Excelsior* rule is invalid because the National Labor Relations Board, in promulgating it, failed to comply with the provisions of the Administrative Procedure Act.

(2) Whether, under Section 11 of the National Labor Relations Act, the Board has power to subpoena the names and addresses of employees and the District Courts have jurisdiction to enforce such subpoenas where the information sought is neither "evidence" nor "testimony" as required by that Act.

(3) Whether, regardless of its procedural infirmities, the *Excelsior* rule is invalid as a matter of substantive law.

(*a*) Whether the *per se* rule announced in *Excelsior* is invalid because it is contrary to the decisions of the Courts, including this Court.

(*b*) Whether the *Excelsior* rule is illegal in that it promotes an invalid dual standard between employers and unions.

(*c*) Whether the *Excelsior* rule violates Section 8(a)(2) and Section 302 of the National Labor Relations Act, as amended.

(*d*) Whether the *Excelsior* rule is invalid because it violates the constitutionally protected right of privacy of the employees.

(4) Whether the *Excelsior* rule is in any event inapplicable to the present case inasmuch as the unions had adequate access to the employees, their names and their home addresses.

Statement of Facts.

On July 12, 1966, the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as the "Boilermakers"), filed a petition with the First Region of the Board, claiming that they represented a majority of the Company's employees and requesting that an election be held by the Board to ascertain whether or not they did, in fact, so represent a majority (A. 8).

On August 26, 1966, a formal hearing was held on the Boilermakers' petition; and at this hearing the United Steelworkers of America, AFL-CIO (hereinafter referred to as the "Steelworkers"), intervened (A. 9). On September 6, 1966, the Regional Director of the First Region directed that an election be held to determine whether the employees of the Company desired to be represented by the Boilermakers, by the Steelworkers or by neither union (A. 9-11).

During the course of the hearing on August 26 the Company, by counsel, advised the Board that in its opinion the requirements of the *Excelsior* case were invalid and that the Board was without justification to require the Company to produce a list of the names *and addresses* of its employees wherein the sole purpose of supplying such a

list was that the list could be transmitted to the unions to aid and abet them in organizing the Company's employees.

Pursuant to the direction of election, an election was held on September 29, resulting in the following tally of ballots (A. 30):

Approximate number of eligible voters	1,750
Void ballots	10
Votes cast for petitioner	226
Votes cast for intervenor	555
Votes cast against participating labor organizations	903
Valid votes counted	1,684
Challenged ballots	6
Valid votes counted plus challenged ballots	1,690

Thereafter, within the prescribed time limitation, both the Steelworkers and the Boilermakers filed objections to the election, based upon the Company's failure to comply with the *Excelsior* rule. On October 19, 1966, the Regional Director upheld these objections (A. 29-34).

Thereafter the Board denied the Company's request for a review of the Regional Director's findings on these objections (A. 35). Finally, on December 29, 1966, the Board issued its subpoena requiring the Company to produce the aforementioned list of names and addresses of its employees (A. 38-39).

When the Company refused to comply with the subpoena, the Board brought action in the United States District Court for the District of Massachusetts to enforce the subpoena, or, in the alternative, it sought a mandatory injunction requiring compliance with the *Excelsior* rule (A. 3-7).

The District Court held that the *Excelsior* rule was a valid rule, and, in accordance with this opinion, enforced the Board's subpoena (A. 101-106). On appeal to the United States Court of Appeals for the First Circuit the Court found that the *Excelsior* rule was invalid, since it was a substantive rule and it was not promulgated in accordance with the provisions of the Administrative Procedure Act.

Argument.

Introduction and Summary.

In 1966 the National Labor Relations Board established a new rule, providing that in all future elections held pursuant to Section 9(c) of the Act the employer would be required to furnish a list of the names and addresses of all its employees within seven days after a consent election had been agreed upon or the Board had ordered the election, and that no election could be held for a period of ten days after the employer had submitted such a list (*Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236). In reaching this decision the Board stated that it would not apply this new rule to the case it then had under consideration, *i.e.*, *Excelsior*, but would make it applicable thirty days following the *Excelsior* decision to all then pending and future election proceedings. The Court of Appeals below found that, in adopting the *Excelsior* rule, the Board had not decided the case between one party and another party, but, in effect, had decided the case in one way and used this decision as a vehicle to promote a prospective rule of substantive nature. The Court below, in commenting on other facets of the case, made gratuitous statements, which are purely *dicta*, as to the substantive nature of the Company's other arguments. However, it specifically refrained from

ruling on any aspect of the case other than the Board's failure to comply with the Administrative Procedure Act.

It is the purpose of this brief to persuade this Court that the Court below correctly set aside the *Excelsior* rule because of the Board's failure to comply with the Administrative Procedure Act, and, in the alternative, to consider and rule upon respondent's other arguments urging the invalidation of the *Excelsior* rule. In the event that the Court declines to consider the other remaining substantive arguments against *Excelsior*, we request this Court to remand the case to the Court of Appeals for determination of the substantive arguments urging the invalidation of the *Excelsior* rule.

I.

The Excelsior Rule is Invalid because the National Labor Relations Board, in Promulgating it, Failed to Comply with the Provisions of the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*)

The Administrative Procedure Act requires an administrative agency to publish notice of a proposed rule in the Federal Register, 5 U.S.C. § 553(b), and to give all interested persons an opportunity to present their views of the proposed rule, 5 U.S.C. § 553(c). Further, in Section 552(a)(1)(D) the Act defines the nature of rules which must be published, and upon which a public hearing must have been held, as including "substantive rules of general applicability."

Section 6 of the National Labor Relations Act, 29 U.S.C. § 156, provides:

> "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and

regulations as may be necessary to carry out the provisions of this subchapter."

The Administrative Procedure Act defines "rule" and "rule making" as follows:

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4).
>
> "rule making" means agency process for formulating, amending, or repealing a rule . . ." 5 U.S.C. § 551(5).

The method by which rules must be promulgated by administrative agencies is set forth in 5 U.S.C. § 553:

> "(b) General notice of proposed rule making shall be published in the Federal Register . . . The notice shall include—
>
> "(1) a statement of the time, place, and nature of public rule making proceedings;
>
> "(2) reference to the legal authority under which the rule is proposed; and
>
> "(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . .
>
> "(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the ruling making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . .

"(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date . . .

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

In addition, 5 U.S.C. § 552(a)(1) provides:

"Each agency shall separately state and currently publish in the Federal Register . . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency . . ."

Clearly, in promulgating the *Excelsior* rule the Board did not follow the required procedure of the Administrative Procedure Act. Yet, in its *Excelsior* decision, the Board recognized the importance of its proposed rule, as indicated by the following statement:

"On April 2, 1965, the National Labor Relations Board, having determined that the Employer's denial of the Petitioner's request for the names and addresses of employees eligible to vote in the election in these two cases presented *a question of substantial importance in the administration of the National Labor Relations Act* . . ." 156 N.L.R.B. at 1238. (Emphasis added.)

Realizing the "substantial importance" of the issues involved, the Board invited certain "interested parties" to file *amicus* briefs. It is interesting to review the "inter-

ested parties." In its *Excelsior* decision the Board stated, at page 1238:

> "The Board also invited certain interested parties to file briefs *amicus curiae* and to participate in oral argument. This invitation was accepted by: the Chamber of Commerce of the United States; American Federation of Labor and Congress of Industrial Organizations; International Union of Electrical, Radio and Machine Workers, AFL-CIO; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO. The National Association of Manufacturers, Retail Clerks International Association, AFL-CIO, and Textile Workers Union of America, AFL-CIO, filed briefs but did not participate in the argument. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America participated in the argument but did not file a brief."

Thus, on the Board's own admission of paying lip service to the Administrative Procedure Act, the Board invited participation in the *Excelsior* case by two trade associations representing management and six unions representing labor. The selectivity of the Board's invitees shows a biased approach to the problem, which constitutes an unwarranted and unjustified rejection of the principles of fair treatment of all interested parties under the provisions of the Administrative Procedure Act.

There can be no dispute that the *Excelsior* rule is a "rule" as defined by the Administrative Procedure Act. Certainly it is "an agency statement of general . . . applicability and future effect designed to implement, interpret,

or prescribe law or policy" 5 U.S.C. § 551(4). It is just as clear that the Board did not comply with the notice, hearing or publication requirements of that Act. The fact that the Board invited a limited group of persons to submit their views, that it announced a sweeping rule applicable to all future elections and that it did not apply it to the facts or parties before it clearly indicates that the Board knew it was making a rule. In so doing, it circumvented the requirements of the Administrative Procedure Act. It is submitted that this the Board cannot do and consequently the *Excelsior* rule is invalid.

The Board in its petition for certiorari and in its brief before this Court lays great stress on the ruling of this Court in *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194 (1947). It is respectfully submitted that the Board's analysis of the issues of the *Chenery* case is completely inappropriate. In that case this Court approved of the establishment of a new rule by the adjudicative method rather than by formal rule-making; but, as the Court of Appeals below pointed out, the decision in the *Chenery* case was between party and party. For this reason alone, *Chenery* is not a substantive precedent upon which the Board can premise its *Excelsior* decision. In the instant case the Court of Appeals disposed of the Board's reliance on *Chenery* in the following language:

> "In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure

it should adopt. The Board has chosen to disregard Congress." (Footnote omitted.)

Wyman-Gordon Co. v. *National Labor Relations Board,* 397 F. 2d 394, 397 (1968).

Although it may be generally true that the choice between rule-making and adjudication is primarily within the discretion of the administrative agency, it is equally true that, once the agency determines which course it will adopt, it must adhere to the provisions of law relating to that method of conduct. Thus a most important question here is whether an administrative agency can promulgate a rule of general applicability prescribing a course of conduct for the future without complying with the Administrative Procedure Act merely by announcing the rule in the course of an adjudicatory proceeding to which the rule does not apply. Certainly *Chenery* does not permit this.

At this point it is pertinent to refer briefly to the legislative history of the Administrative Procedure Act. In Report No. 752 of the Committee on the Judiciary, 79th Congress, 1st Session, in considering the Act, it is stated:

> "The specification of activities that are involved in rule making is included in order to comprehend them beyond any possible question. They are defined as rules to the extent that, whether of general or particular applicability, they formally prescribe a course of conduct for the future rather than merely pronounced existing rights or liabilities."

In describing the type of "rule" for which the Administrative Procedure Act required publication and a hearing,

Senator McCarran stated on the Senate Floor that the term "rule"—

> "is defined as any agency statement of general applicability designed to implement, interpret, or prescribe law, policy, organization, procedure or practice requirements." Senate Doc. 248, 79 Congress, 2d Sess., p. 306, Legislative History of the Administrative Procedure Act.

There have been, of recent date, numerous cases in which various Courts of Appeals, while upholding the establishment of new rules on an adjudicatory basis rather than on a rule-making basis, have increasingly criticized the Board for its failure to promulgate such rules under the Administrative Procedure Act. *Cf. National Labor Relations Board* v. *A.P.W. Products Co.*, 316 F. 2d 899, 905 (1963); *National Labor Relations Board* v. *Majestic Weaving Co., Inc.*, 355 F. 2d 854, 860 (1966); *National Labor Relations Board* v. *Penn Cork & Closures, Inc.*, 376 F. 2d 52, 57, cert. den. sub nom. *District Lodge No. 15* v. *National Labor Relations Board*, 389 U.S. 843 (1967). In *National Labor Relations Board* v. *Penn Cork & Closures, Inc., supra*, at page 57, the Court stated:

> "It would indeed have been far better if the Board had conducted a rule-making proceeding under § 4 of the APA . . . Regrettable as is the Board's continued failure to use its rule-making powers . . . we cannot say that, on the facts of this case . . . its choice to proceed by the adjudicative route was beyond its power."

Many legal commentators have expressed similar dissatisfaction with the Board and other administrative agen-

cies for failure to use their rule-making powers as set forth in the Administrative Procedure Act. See, generally, Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board,* 70 Yale L.J. 729 (1961); Friendly, *The Federal Administrative Agencies: The Need for Better Definitions of Standards,* 145-147 (1962); 1 Davis, *Administrative Law Treatise,* § 6.13 (1965 pocket part); and Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921 (1965).

These cases and articles express regret that the Board, and other agencies, have failed to use their rule-making powers when it would be appropriate and advisable to do so. But, as the Court noted in *Penn Cork, on the facts of those cases,* the Board had the power to proceed by adjudication. However, it is submitted that on the facts of *this* case the Board did not have such power. It is apparent from an objective evaluation of the action taken by the Board in *Excelsior* that the Board chose to broaden its investigation and to engage in general rule-making. It was at this point that the Board was bound to take the necessary, and relatively simple, step of conforming its conduct to the notice, hearing and publication requirements of the Administrative Procedure Act.

In a decision involving a situation similar to the instant case, this Court found a ruling of the Interstate Commerce Commission invalid for failure to comply with the Administrative Procedure Act. See *Chicago, Burlington & Quincy Railroad Co.* v. *United States,* 242 F. Supp. 414, affirmed per curiam sub nom. *Chicago & North Western Railway Co.* v. *Chicago, Burlington & Quincy Railroad Co.,* 382 U.S. 422 (1966). In that case the lower Court had held that the promulgation of a rule for future application, though done in the course of an adjudicatory proceeding,

constituted rule-making, and could not be done without compliance with the publication, notice and hearing requirements of the Administrative Procedure Act. Because the *Excelsior* rule is likewise invalid, the Respondent is under no duty to comply with it. See *Hotch* v. *United States*, 212 F. 2d 280 (1954); *Gonzalez* v. *Freeman*, 334 F. 2d 570 (1964); *Seaboard World Airlines, Inc.*, v. *Gronouski*, 230 F. Supp. 44 (1964).

At this point it is proper to attempt to evaluate the Board's refusal to comply with the provisions of the Administrative Procedure Act in nearly all areas of rule-making. For example, Professor Peck indicates that, during the period 1954 through 1959, the Board, in numerous instances, changed the dollar jurisdictional amount above which it would assert jurisdiction of business affecting commerce solely by means of press releases. Peck, *supra*, pp. 736-737, nn. 32-41. Certainly, it is clear that, where the Board makes such a change by means of a press release, employers and unions have little or no recourse to the Courts to seek review of the Board's arbitrary and often capricious approach to the mandate of Congress, in enacting the National Labor Relations Act, that the Board should seek stability in labor-management relations. The effect of such an approach is completely to unstabilize labor-management relations so that neither unions nor management can know from one day to the next whether their actions are legal and valid.

In regard to these dollar jurisdictional changes over the years, the Board has completely ignored Section 14(c)(1) of the Act, which provides:

> "The Board, in its discretion, may, *by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act*, decline to assert jurisdic-

> tion over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." (Emphasis added.)

Concerning the *Excelsior* rule, just as with the press-release rule changes, the Board has been unable to point to any specific provision of the Act which authorizes or even permits the action it has taken. Indeed, it is submitted that the Board cannot find authorization for the promulgation of the *Excelsior* rule in any provision of the Act itself.

As stated in 1 Davis, *Administrative Law Treatise,* § 6.13, at p. 149 (1965 pocket part):

> "When the rule-making element in an adjudication becomes the dominant element to such an extent that concern for the particular adjudication almost disappears, the Board may be in a very deep sense, not merely in a technical sense, violating both Secs. 3 and 4 of the Administrative Procedure Act, because the result then involves procedural injustice . . ."

What the Board did in *Excelsior* is certainly procedural injustice of a most offensive character. It has practically succeeded in insulating itself from legitimate challenge from any quarter.

The Board seeks to find justification for its notorious failure to follow the rule-making procedures of the Administrative Procedure Act because "the cumbersome procedure of amending formal rules would impede 'the law's

ability to respond quickly and accurately to changing industrial practices'" (Board's Brief, p. 15, and note 12).

It is submitted that, if the Board were to make more frequent use of its rule-making powers, it would greatly stabilize industrial practices to the convenience of employees, unions, employers and the general public, whose varied interests Congress has entrusted to the Board for stabilization.

A review of the *Excelsior* decision itself clearly belies the fact that adjudication rather than rule-making permits quick response by the Board to changing situations. In *Excelsior* an election was held on December 6, 1963. In its companion case, *K. L. Kellogg & Sons*, an election was held between May 15 and 28, 1964. On April 2, 1965, the Board consolidated these two cases and invited special interested parties to present their views on the matter of whether or not names and addresses should be required in future Board elections. The Board received briefs from these parties, and on May 20, 1965, held oral argument on the matter. Finally, on February 4, 1966, the Board issued its decision in *Excelsior*. Thus, in the *Excelsior* case, the Board's decision came down two years and two months after the election, and in the *Kellogg* case just short of two years.

The Board finds further justification for the establishment of new rules and regulations by adjudication rather than by rule-making on the ground that the Board itself cannot initiate its own processes. While it is true that the Board cannot initiate an unfair labor practice charge under Section 8 of the Act or a representation proceeding under Section 9 of the Act, this statement is absolutely false when one considers the provisions of Section 6 of the Act, whereby the Board is specifically authorized by Congress "*from time to time to make, amend, and rescind, in the manner*

prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.''

In its failure to utilize its rule-making authority in *Excelsior* and in the other cases cited *supra*, the Board has completely ignored the mandate of Congress.

II.

THE BOARD LACKS POWER TO SUBPOENA THE NAMES AND ADDRESSES OF EMPLOYEES, AND THE DISTRICT COURTS ARE WITHOUT JURISDICTION TO ENFORCE SUCH SUBPOENAS, SINCE THE INFORMATION SOUGHT IS NEITHER ''EVIDENCE'' NOR ''TESTIMONY'' AS REQUIRED BY SECTION 11 OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 161.

Section 11(1) of the National Labor Relations Act, 29 U.S.C. § 161(1), clearly limits the scope of the Board's subpoena power to ''evidence'' or ''testimony'' relating to a ''matter under investigation or in question.'' Similarly, Section 11(2) of the Act, 29 U.S.C. § 161(2), confers jurisdiction on the District Courts to enforce a Board subpoena, but again this is unquestionably restricted to the production of ''evidence'' or giving of ''testimony'' ''touching the matter under investigation or in question.''

Despite the plain meaning of this statutory language, the Board contends, and rather amazingly it has received support from some Courts, that it has the power to issue subpoenas, which the District Courts have power to enforce, seeking the names and addresses of employees solely for the purpose of turning them over to unions for use in election campaigns. It is submitted that this contention is without foundation, and, unless the Board can establish the necessity of the production of evidence or the submission of testimony touching the matter under investigation

in order to resolve an issue before it, the District Court is without authority to enforce the Board's subpoena. See *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298 (1924); *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F. 2d 450 (1941); *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. 2d 692 (1941).

The Board has clearly indicated that the sole purpose of requiring the *Excelsior* list is for transmittal of these lists to the union or unions involved in a representation case. Where this is the avowed purpose of requiring the Respondent to supply such a list, it is inconceivable that the Board or this Court can find justification for the production of such lists on the ground that they constitute evidence or testimony.

> "Evidence is a demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the fact or point in issue, either on the one side or on the other. In legal acception, the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 31 C.J.S., "Evidence," § 2.

The gravamen of this situation is that the Board misconstrues its statutory authority under Section 11 and misconstrues the type of information to which it is entitled under the provisions of the Act.

In *Excelsior* the Board goes to great length in attempting to equate the right of a stockholder to obtain the names and addresses of fellow stockholders in the corporation. It finds in this area justification for its *Excelsior* decision. It has been acknowledged by the Courts, including the

Supreme Court of the United States, that recognition must be given to the Board's "expertise" in matters pertaining to labor management relations. However, the Board's approach and argument, based upon a stockholder relationship, belies any expertise of the Board in the field of corporate law. The reason that an individual stockholder may obtain a list of all stockholders in the corporation is based primarily upon the fact that a stockholder, no matter how small his holdings, is a partial owner of the corporation and as such has a right, both under common law and under statutory law, to know who his fellow stockholders are and to address them on any matter which he feels is of personal interest to them.

Again, the Board in *Excelsior* seeks sustenance to support its position on the ground that in a national, state or local election a candidate for office may secure the names and addresses of all registered voters. Presumably this is in order that the candidate can address the voters by mail, by telephone, or by personal visits. Going further, the Board again seeks support in the fact that a candidate for a union office is entitled to have the union distribute his personal campaign literature to all members. The Board's argument on both of these two issues is completely naive and belies an "expertise" of the Board in these areas. The availability of a voters' list in a public election is a statutory right, and the requirement that a candidate for office in a union have a right to have the union distribute his literature for him is a statutory right.

In the present situation, the Board has not and cannot cite any provision in the Act which requires an employer to supply the information here requested by the Board, or indeed permits the Board to request such information.

The Board completely fails to understand or acknowledge the true nature of a subpoena and why subpoenas are nec-

essary and vital. A subpoena has been described in the following language:

> "A 'subpoena' . . . is process, or a writ . . . for the purpose of compelling the attendance of a person whom it is desired to use as a witness . . . A writ which does not cause a witness to . . . give testimony . . . is not a subpoena." 97 C.J.S., "Witnesses," § 20.

> "Generally speaking, a subpoena duces tecum may be issued to compel the production of any proper documentary evidence, such as books, papers, documents, accounts and the like, which is desired for the proof of an alleged fact relevant to the issue before the Court or officer issuing the subpoena . . ." 97 C.J.S., "Witnesses," § 25e.

The Board has not urged and cannot urge upon this Court that the information they are presently seeking comes within the foregoing definition of a subpoena or the purposes for which a subpoena may be issued.

There can be no issue as to the purpose for which the Board seeks the names and addresses of the Company's employees. It is clearly set forth in Board's Exhibit B (A. 11), in the following language:

> "An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, on or

before Sept. 13, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." *Excelsior Underwear, Inc.*, 156 N.L.R.B. No. 111.

There is no controversy involved which the Board seeks to resolve by its subpoena. There is no information that the Board seeks to obtain to assist the Board in the conduct of the election. As will be pointed out below, the Board's argument in regard to minimizing challenges during the course of the election is, in this proceeding, without foundation in fact. The Board's 32d Annual Report substantiates the fallacy of minimizing challenges by use of the lists (*infra*, p. 36). Section 11 of the Act, upon which the Board bases its alleged claim to jurisdiction for itself and for the Court, reads in part as follows:

> "The Board . . . shall at all reasonable times have access to . . . evidence. . . . The Board . . . shall upon application . . . issue . . . subpoenas requiring the attendance and testimony of witnesses or the production of . . . evidence . . ."

Section 11(1) of the Act then discusses the areas in which the Board may properly issue a subpoena. In each instance, however, the right to issue a subpoena is based upon the necessity of the Board's ascertaining "evidence" or the necessity of the "production of evidence before the Board." Section 11(2), which grants District Courts "jurisdiction" to enforce Board subpoenas, again states em-

phatically that in the enforcement of such subpoenas the purpose is to afford the Board the right to produce "evidence" or to obtain "testimony."

The list which the Board is seeking here does not come, under any stretch of the imagination, within the terms of evidence or testimony.

The information which the Board solicits cannot aid or assist the Board in the determination of whether or not there is a question affecting interstate commerce. The sole purpose for which the Board seeks the *Excelsior* list is to aid and abet the unions in their attempts to seek a representative status of the Company's employees.

If the Board feels that the *Excelsior* lists are appropriate and necessary to the conduct of an election under the Act, its recourse is to the Congress of the United States and not to the Courts.

Congress could easily have granted the Board the subpoena power which the Board here contends it has. But Congress chose not to do so. Any doubt that could exist as to this is clearly dispelled by an investigation of the legislative history of Section 11. Notably, a preliminary version of the Act gave the Board the power to compel production of material which it deemed "relevant or material to the inquiry." S. 2926, 73d Cong., 2d Sess., § 208(1) (1934). However, the statute as enacted limited this investigatory power to "evidence" or "testimony." See also I Leg. His. of N.L.R.B. 1108 (1935); II Leg. His. of N.L.R.B. 2932 (1935).

Moreover, where Congress has intended to grant more extensive investigatory powers to administrative agencies, it has done so most clearly. For example, the Railway Labor Act, which predates the National Labor Relations Act, grants the National Mediation Board access to books and records "to obtain and utilize such information as may be

deemed necessary by it to carry out the purposes and provisions of this paragraph." 45 U.S.C. § 152.

This language is clearly distinguishable from, and much broader than, that of Section 11, with which we are here concerned. Section 11 provides, in part, that the Board shall—

> "have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question."

Thus, whereas the Railway Labor Act gives the National Mediation Board the power "to obtain and utilize" any information it deems necessary, Section 11 permits the National Labor Relations Board only to examine or copy evidence relating to a matter under investigation or in question.

From this it is clear that Congress intended to, and did, limit the Board's subpoena power. Congress could have used the same type of language that it had used in the Railway Labor Act or that had been originally proposed with respect to Section 11 of the National Labor Relations Act. The fact that it decided to use more restrictive language is conclusive on the Board's argument here and disposes of it.

The District Court, the Board assumes, is to be nothing but a rubber stamp that must automatically enforce its subpoena. The Board gives no consideration to the fact that it is seeking equitable relief. It ignores the fact that, in equity, it is asking the Court to exercise its discretion. While it is the Company's position that the District Court had no jurisdiction based upon the foregoing statutory language to support the complaint, since neither testimony nor evidence is involved, it is still within the Court's discretion

to determine whether or not it should in propriety sustain the Board's request. It is submitted that it should not.

III.

Regardless of its Procedural Infirmities, the Excelsior Rule is Invalid as a Matter of Substantive Law.

There are compelling reasons for this Court to consider the entire case on its merits. Such a review will resolve the many issues presented by the extensive, often conflicting, litigation that has been generated by the *Excelsior* rule. In addition to the First Circuit, five other Courts of Appeals and numerous District Courts have been called upon to consider various of the contentions raised by the Respondent here. A brief summary of these decisions will indicate how differently, both quantitatively and qualitatively, these Courts have treated the questions involved. The resultant confusion, dissatisfaction and uncertainty highlight the necessity that these issues be resolved.

The following cases are presented here only to indicate the nature of the present situation. Other sections of this Brief present the Respondent's arguments and contentions concerning the issues discussed in these cases.

In *National Labor Relations Board* v. *Hanes Hosiery Division-Hanes Corp.*, 384 F. 2d 188 (1967), cert. den. 390 U.S. 950 (1968), the Court of Appeals held that an *Excelsior* list was "'evidence' of a 'matter under investigation or in question.'" *Id.*, at 191. However, the Court did not discuss what might constitute "evidence," nor did it discuss the question of the validity of the *Excelsior* rule. Other contentions raised by the employer were passed off quite summarily.

In *National Labor Relations Board* v. *Rohlen*, 385 F. 2d 52 (1967), the Court rejected the employer's challenge of

the validity of the *Excelsior* rule, simply on the basis of the *Excelsior* decision itself. The Court enforced the Board's subpoena, saying that, so long as the material sought touches a matter under investigation, it does not matter that it is not "evidence" in the generally accepted sense of that term.

Howell Refining Co. v. *National Labor Relations Board*, 400 F. 2d 213 (1968), primarily concerned a petition by the employer to set aside an election. The Court, merely citing *Hanes Hosiery* and *Rohlen, supra*, said that the *Excelsior* rule was a valid exercise of the Board's power, and dismissed the employer's contention to the contrary. In a footnote, which was pure *dicta*, and without benefit of briefs or arguments on the point, the Court noted its disagreement with *Wyman-Gordon*. *Id.*, at 216, n. 8.

The Second Circuit, in *National Labor Relations Board* v. *Beech-Nut Life Savers*, F. 2d , 69 L.R.R.M. 2846 (1968), quite narrowly construed the employer's contention that the *Excelsior* rule was improperly promulgated, and held that it did not violate the Administrative Procedure Act. Relying on *Hanes Hosiery* and *Rohlen, supra*, the Court said the Board may subpoena data which are "relevant and helpful," regardless of the fact that they are not "evidence" as that term is generally used.

Some of these issues were again raised in *British Auto Parts, Inc.*, v. *National Labor Relations Board* (together with *Teledyne, Inc.*, v. *National Labor Relations Board*), F. 2d , 70 L.R.R.M. 2065 (9th Cir. 1968). There the Court disposed of most of the employers' contentions, relying on *Hanes Hosiery* and *Rohlen, supra*. It also disagreed with the contention that the Board acted improperly in failing to comply with the Administrative Procedure Act, and, again citing the cases mentioned above, sustained the Board's power to subpoena the *Excelsior* list.

The most recent Court of Appeals decision in this area is *Groendyke Transport, Inc.*, v. *Davis*, . F. 2d , 70 L.R.R.M. 2268 (5th Cir. 1969). There the Court simply held that the District Court, in enjoining enforcement of the Board's subpoena, erroneously relied on *Wyman-Gordon, supra,* since it (the Fifth Circuit) later approved the *Excelsior* rule in *Howell Refining, supra.*

If anything, the District Court opinions concerning the *Excelsior* rule present an even greater degree of conflict and confusion than do those of the Courts of Appeals.

In *National Labor Relations Board* v. *Wolverine Industries Division,* 64 L.R.R.M. 2187 (E.D. Mich. 1967), the Court granted enforcement of the Board's subpoena, and ruled that "evidence" under Section 11 of the Act, includes all information necessary or helpful to the Board.

A quite similar case, but one with a different result, is *National Labor Relations Board* v. *Montgomery Ward & Co.,* 64 L.R.R.M. 2299 (M.D. Fla. 1967). Here the Court denied enforcement of the Board's subpoena because it did not seek the production of "evidence" as that term is used in Section 11 of the Act, but rather sought the names and addresses of the employees merely to turn them over to the union. Moreover, the Court, as a matter of sound discretion, denied the alternative injunctive relief requested by the Board.

In *Swift & Co.* v. *Solien,* 66 L.R.R.M. 2038 (E.D. Mo. 1967), the Court denied the employer's request for an injunction, and in *National Labor Relations Board* v. *Swift & Co.,* 67 L.R.R.M. 2473 (E.D. Mo. 1967), it granted enforcement of the Board's subpoena, indicating its view that the term "evidence" as used in Section 11 of the Act includes all material which is of assistance to the Board.

National Labor Relations Board v. *Q-T Shoe Manufacturing Co., Inc.,* 279 F. Supp. 1 (1968), in which the Court

denied the relief sought by the Board, presents a most clear discussion of the meaning of "evidence" as that term is used in Section 11 of the Act. *Id.*, at 6-7. The Court concluded that the Board's subpoena was improper and unenforceable. Furthermore, it held that an injunction could be sought only after the Board has properly determined that refusal to furnish an *Excelsior* list constituted an unfair labor practice.

In *National Labor Relations Board* v. *Cone Mills Corp.*, 68 L.R.R.M. 2980 (D. S.C. 1968), the Court granted enforcement of the Board's subpoena, ruling that *Hanes Hosiery, supra,* was controlling. Therefore it engaged in little, if any, discussion of the contentions raised by the employer.

In *National Labor Relations Board* v. *Daniel Construction Co.*, 69 L.R.R.M. 2206 (D. S.C. 1968), the Court granted enforcement of the Board's subpoena, saying it was bound to do so by the decision of the chief judge of the district in *Cone Mills, supra,* and by *Hanes Hosiery, supra.* However, it limited the scope of the subpoena by allowing the union to communicate with former employees only by mail in an attempt to preserve equality between the employer and the union.

In *National Labor Relations Board* v. *J. P. Stevens & Co.*, 69 L.R.R.M. 2756 (W.D. N.C. 1968), the Court, saying it was bound by *Hanes Hosiery,* granted enforcement of the Board's subpoena. However, with respect to the contention raised by 219 employees who were allowed to intervene that furnishing the *Excelsior* list would violate their right of privacy, the Court said:

> "The real issue in this controversy is raised by the Company's 2nd Contention and the contentions of the Intervener employees that their fundamental rights would be violated if the Company is ordered to comply with the order of the Board. Its defenses raise ques-

tions of considerable merit and the arguments and briefs are most impressive in this respect." *Id.*, at 2757.

As noted above, the preceding cases have been outlined here solely to indicate the extent and nature of the confusion that exists among the various Courts that have dealt with *Excelsior*. As previously mentioned, the Respondent's position on the issues involved in these cases is presented in other parts of this Brief.

Another reason why this Court should consider the entire case stems from the well-established principle that a respondent is entitled to "urge any matter appearing in the record in support of a judgment . . ." *LeTulle* v. *Scofield*, 308 U.S. 415, 421 (1940). One of the cases most frequently cited for this proposition is *Langnes* v. *Green*, 282 U.S. 531 (1931), where the Court said:

> "In the present case, however, it is not necessary to consider this rule of practice [that the Court is not bound to consider objections to the decree below urged by a respondent who did not seek certiorari] because the respondent offers no objection to the decree of the court of appeals. In that court he attacked the decree of the district court upon . . . two grounds . . . and the circuit court of appeals sustained the attack but upon one of such grounds only. Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge . . ." (P. 538.)

Other cases recognizing the right of a respondent in certiorari to support the judgment of the lower Court on

grounds rejected by that Court include *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 560 (1931); *Stelos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U.S. 237, 238-239 (1935); *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463, 466-467 (1941); and *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947).

This principle is not limited to issues rejected by the lower Court, but applies as well to issues that were not passed upon by that Court and even to points not raised there. In *United States* v. *Ballard*, 322 U.S. 78 (1944), the Court of Appeals reversed the convictions of the respondents and granted them a new trial. In discussing the respondents' right to sustain the judgment of the Court of Appeals, this Court observed, at page 88:

> "Respondents maintain that the reversal of the judgment of conviction was justified on other distinct grounds. The Circuit Court of Appeals did not reach those questions. Respondents may, of course, urge them here in support of the judgment of the Circuit Court of Appeals. *Langnes* v. *Green*, 282 U.S. 531, 538-539; *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 560, 567-568. But since attention was centered on the issues which we have discussed, the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances we deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved. . . . If any questions of importance survive and are presented here, we will then have the benefit of the views of the Circuit Court of Appeals."

See also *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U.S. 188, 198 (1939). Similarly, where the judgment below was rested upon an erroneous ground, a respondent

in certiorari may justify it on a different and valid ground. *Ryerson* v. *United States*, 312 U.S. 405, 408 (1941). And as noted above, a respondent may seek to sustain the judgment below on a ground raised for the first time in argument before this Court. *Marshall* v. *Pletz*, 317 U.S. 383, 389-390 (1943).

A. The Per-Se Rule Announced in Excelsior is Invalid because it is Contrary to the Decisions of the Courts, Including This Court.

In *Excelsior* the Board has adopted a doctrine that cannot withstand the thrust of decisions of the United States Supreme Court, presuming an imbalance of communication between an employer and the union or unions seeking to represent employees. The Board in *Excelsior* has determined that it is necessary that the unions be supplied with the names and addresses of employees.

This Court has consistently held that a union does not have, except in unusual circumstances, such a right of communication. In *National Labor Relations Board* v. *United Steelworkers of America, CIO (NuTone, Inc.)*, 357 U.S. 357 (1958), the Court clearly upheld the principle that a union does not have a statutory right under the provisions of the Act to distribute union literature on company time and on company property. In order to establish such rights, the Court held that it had to be affirmatively shown that an employer's rule barring such activity actually limited or reduced the union's ability to campaign among the employees.

> "Of course the [employer's] rules had the effect of closing off one channel of communication [to the union]; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law,

under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. Cf. *Bonwit Teller, Inc.*, v. *Labor Board*, 197 F. 2d 640, 646; *Labor Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78, 84 (concurring opinion). No such mechanical answers will avail for the solution of this non-mechanical, complex problem in labor-management relations. If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules. The Board, in determining whether or not the enforcement of such a rule in the circumstances of an individual case is an unfair labor practice, may find relevant alternative channels available for communications on the right to organize. When this important issue is not even raised before the Board and no evidence bearing on it adduced, the concrete basis for appraising the significance of the employer's conduct is wanting." *Id.*, at 363-364.

Earlier, this Court had established this principle in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). There, in determining the area of assistance which an employer may or may not give to a union, the Court said:

"This is not a problem of always open or always closed doors for union organization . . . *The em-*

ployer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.'' (Emphasis added.)

Two Court of Appeals decisions are most significant and most applicable to the present situation.

In *May Department Stores Co.* v. *National Labor Relations Board*, 316 F. 2d 797 (1963), the Court of Appeals overruled a decision of the Board wherein the Board had found that a union was entitled to equal time on company property to respond to noncoercive yet strongly anti-union employer's speeches. The Court found that the Board had not established the nonaccessibility of the employees, and therefore the unusual remedy sought to be established by the Board could not stand the test of the Supreme Court decisions, *supra*.

The Court said at 801:

> ". . . neither the use of the magic word 'imbalance' nor the characterization of alternative avenues of communication as 'ineffective' . . . can give the Union a right of access which the Supreme Court of the United States has refused to recognize and which it does not possess."

In a similar vein, the Tenth Circuit, at an earlier date, denied the right of a union's access to channels of communication other than those that are normally available. *Cf. National Labor Relations Board* v. *Seamprufe, Inc.*, 222 F. 2d 858 (1955).

In affirming the *Seamprufe* approach in this attempt to rationalize an excessive right of communication, this Court, in *Babcock & Wilcox, supra*, stated at page 112:

> "It is our judgment, however, that an employer may validly post his property against nonemployee distri-

bution of union literature *if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message* and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." (Emphasis added.)

The Board, in adopting *Excelsior*, established a *per se* rule which is applicable to all elections subsequent to the effective date of this rule. Without exception, the Board requires the employer to submit to it a list of names of all employees within seven days and refuses to permit an election to be held in less than ten days thereafter. In the National Labor Relations Board Field Manual dated July, 1967, as amended, no deviation from the *Excelsior* rule is permitted even though both parties to the election proceeding may be willing to waive their rights under the rule (Field Manual, § 11312).

The Board claims that the rule is necessary to permit unions properly to present their side of the story to prospective members. They stress in *Excelsior* that it may be impossible for the unions to contact all of the employees, because of lack of names and addresses. Yet, in 1965, the last full year prior to *Excelsior*, 71.1 per cent of all elections conducted were in units comprised of less than 50 employees; 46.6 per cent were in units comprised of less than 20 employees (*cf.* Table 17, National Labor Relations Board 30th Annual Report). Again, in 1967, the first full year after *Excelsior* (*cf.* Table 17, National Labor Relations Board 32d Annual Report), 71.2 per cent of all elections were held in units consisting of less than 50 em-

ployees and 46.4 per cent of the elections were held in units consisting of less than 20 employees. It is submitted that in such small units there is no difficulty in ascertaining the names and addresses of all employees in the prospective unit, and, therefore, there is no justification for a *per se* rule applicable to all elections conducted by the Board.

There could be some justification for the *Excelsior* rule in large collective-bargaining units consisting of thousands of employees or employees widely scattered from a main or central office, but the establishment of the *per se* rule applicable to units of less than 20 or less than 50 clearly indicates that the primary intention of the Board is to assist union organizational activity, and not merely to provide better information to employees whom a union is attempting to organize.

A second premise upon which the Board promulgated the *Excelsior* rule is that the supplying of names and addresses will drastically curtail challenges of prospective voters at the election, and thereby eliminate much time and effort of the Board, and the parties to the election, in resolving these challenges following the election. In the *Excelsior* decision the Board set out this proposition in the following language:

> "With little time (and no home addresses) with which to satisfy itself as to the eligibility of the 'unknowns', the union is forced either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will,

> we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity. Furthermore, bona fide disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significances of a single vote is apt to loom large in the parties' calculations. Thus, the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation." 156 N.L.R.B. at 1243.

An analysis of the Board's own records clearly refutes this entire argument. Each year the National Labor Relations Board files its Annual Report with the President of the United States, the President of the Senate and the Speaker of the House of Representatives. In this report it reviews its activities for the prior fiscal year. In addition, it has statistical tables showing its various activities involving unfair-labor-practice cases and representation elections. Table 11A is entitled: "Elections in Which Certification Issued After Objections to Election Were Filed and/or in Which Determination of Challenges Was Required." One of the items in this table is "Challenges Only."

For the year ended June 30, 1965, the last fiscal year prior to the establishment of the *Excelsior* rule, the Board conducted 7,776 elections. Of this number, 312 elections involved "Challenges Only," which required resolutions subsequent to the election. Thus, in 1965, of the total elections the Board conducted, 4.01 per cent involved "Chal-

lenges Only," which had to be resolved by hearings subsequent to the election (30th Annual Report of the National Labor Relations Board, Table 11A).

In 1967, the first full fiscal year after the establishment of the *Excelsior* rule, the Board conducted 8,116 elections. Of this number, 371 elections involved "Challenges Only," upon which the Board was required to hold hearings. Of the total elections held in 1967, 4.57 per cent involved cases in which there were challenges that had to be resolved by post-election hearings (32d Annual Report of the National Labor Relations Board, Table 11A).

Despite the Board's concern for challenges, *supra*, it is clear from these figures that the improvement factor since the promulgation of the *Excelsior* rule is minus .56 per cent. It is submitted that the Board's concern for challenges is not substantiated by comparison with those cases involving challenges in 1965 and in 1967, where, indeed, the percentage of challenged cases increased following the promulgation of the *Excelsior* rule.

In the instant case there has been no finding that there was a lack of accessibility to the two unions involved towards the employees of the employer. Indeed, no such contention is made by the Board, nor can it be made. As a matter of actual practice, the Board included in its Direction of Election a demand that the *Excelsior* list be supplied (A. 11). This automatic application of the *Excelsior* rule is in defiance of the decisions of the Supreme Court cited herein.

B. The Excelsior Rule is Illegal inasmuch as it Promotes an Invalid Dual Standard of Conduct between Employers and Unions.

The Board dwells at great length on the value of the *Excelsior* rule in promoting better understanding of the

issues involved in a union election. It indicates that the *Excelsior* rule will facilitate a union in its communications with employees by mail, by telephone, and finally by visits to the employees' homes.

The Board fails to give the Court a proper picture of the situation as it exists as a result of the Board and court decisions between the rights, privileges and obligations of a union against the rights, privileges and obligations of an employer.

In an organizational campaign, a union has an absolute right to make any promises of benefits that it allegedly can gain from the employer. It has a somewhat limited but a very real right of harassment and coercion in obtaining employees' signatures on membership cards.

In contrast to this, an employer is under a statutory admonition proscribing such activities as promises, threats or coercion (*National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405 (1964); *National Labor Relations Board* v. *Bailey Co.*, 180 F. 2d 278 (1950)). Indeed, it has now become a *per se* violation of the Act for an employer to visit the homes of his employees and to discuss union matters and union organizational activities (*Peoria Plastics Co.*, 117 N.L.R.B. 545 (1957)). It is an unfair labor practice for an employer to ask an employee whether or not he belongs to the union. It is an unfair labor practice for an employer to discuss union activities in the "Boss's office" (*cf. General Shoe Corporation*, 77 N.L.R.B. 124 (1948); 97 N.L.R.B. 499 (1951); *National Caterers of Virginia*, 125 N.L.R.B. 110 (1959)).

In promulgating the *Excelsior* rule, the Board in its militancy seeks to further the advocacy of unionism without justification or foundation in statutory authority given to it by Congress.

C. The Excelsior Rule is a Violation of Section 8(a)(2), and Section 302 of the National Labor Relations Act as Amended.

Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) reads as follows:

> "It shall be an unfair labor practice for an employer—
>
> ". . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."

Over the course of the years, the Board has consistently been zealous in prosecuting employers who show favoritism towards one union as against another or have in any way assisted a union in organizing its employees where only one union was involved. Its approach to these situations stems from the foregoing provisions of Section 8(a)(2) of the Act.

In 1961, in *A. O. Smith Corp.*, 132 N.L.R.B. 339, 48 L.R.R.M. 1340, the Board specifically stated:

> "We agree with the Trial Examiner that this act by the Company (furnishing employees' names and addresses to a Union) constituted illegal assistance."

The Board's ruling in that case was ultimately upheld by the Seventh Circuit, 343 F. 2d 103, 114 (1965). A similar conclusion was reached by the Ninth Circuit in *National Labor Relations Board* v. *L. Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730, 734 (1953), in which the Court said:

> "Respondent's furnishing of a list of the names and addresses of its employees to the District Council of Carpenters (AFL) was an illegal act of assistance under § 8(a)(2) of the Act."

To the same accord see—

Hershey Metal Products Co., 76 N.L.R.B. 695, 21 L.R.R.M. 1237 (1948).

Wagner Iron Works, 104 N.L.R.B. 445, 32 L.R.R.M. 1104 (1953).

National Labor Relations Board v. *Wagner Iron Works & Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL)*, 220 F. 2d 126 (1955).

The effect of the Board's ruling in *Excelsior* and the continuing impact of the foregoing cases appears to place the Board in a completely incongruous dilemma. It is illegal and a violation of Section 8(a)(2) of the Act for an employer voluntarily to assist a labor organization by giving to it the information called for in *Excelsior*. However, if the Board sees fit to order such information to be given to the union, by some mystical wave of the wand, such information and assistance no longer violate Section 8(a)(2) of the Act. In effect, it is illegal for an employer to give this information on Monday and it is illegal for an employer not to give it on Tuesday.

In amending the National Labor Relations Act of 1947 (Taft-Hartley Act), Congress was seriously concerned about payments made by employers to representatives of their employees or to individuals seeking to obtain a representative position. As a result of this concern, it enacted Section 302 of the Act, which in pertinent part reads as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend,

or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

. . . . . .

"(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

. . . . . .

"(d) Any person who willfully violates any of the provisions of the section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both." (29 U.S.C. § 186.)

From the statutory language it is clear that the giving of a thing of value constitutes a criminal act under Section 302(a), and further that anyone who demands a thing of value from an employer for the use of any representative of his employees or any individual seeking to represent his employees comes in direct conflict with the criminal provisions of the Act (Section 302(b)(1)).

During the investigation of the objections to the conduct of the subject election, the Company categorically stated

that the giving of a list of the names and addresses of its employees to the Board, whose sole intention and purpose were to transmit said list both to the Boilermakers and to the Steelworkers, constituted a violation of the foregoing sections of Section 302 (A. 33). At that time the Company requested the Regional Director to hold a hearing to resolve the issue of whether or not such a list constituted a thing of value. The Regional Director did not see fit to hold such a hearing and, in effect, completely ignored this request.

When the Board, on December 27, 1966, served a subpoena duces tecum upon the Company, the Company then filed a motion to the Board requesting that the subpoena be quashed (A. 40-42). In this motion the Company again alleged that the list was a thing of value within the meaning of Section 302. Again the Company requested a hearing to determine whether or not the list constituted the giving of a thing of value, which request was completely ignored by the Board (A. 40-42).

It is, or it certainly should be, common knowledge of which this Court can take judicial notice that a list of names and addresses of individuals—a mailing list—is a thing of value. Mailing lists are compiled by mail advertising houses and are used for the distribution of mail on behalf of their customers. There are other corporations and businesses who make a very active and successful business of merely compiling such lists and renting or selling them to mail advertising houses (A. 67-101).

U.S. Representative Clement J. Zablocki, of the 4th District of Wisconsin, has been seriously concerned over the distribution of pornographic literature through the United States mails. Several years ago he submitted a bill in the United States Congress that, in effect, provided that all persons who deal in mailing lists must keep a record of the

uses to which these mailing lists were used; if a list were rented or sold, the individual who possessed the list must retain a record of these transactions; and his record would be subject to inspection by the United States Post Office Department (A. 53-65).

Again, in 1967, Representative Zablocki submitted a substantially similar bill (A. 53-65). In presenting his bill to Congress, Congressman Zablocki stated on the floor on February 9, 1967:

> "For example, in reviewing mailing list catalogues in my possession, I have found that a list of 918 pedigreed swine breeders can be had for $57.50, a list of 27 deaf missionaries for $8.00 and the names of 24 zwieback manufacturers for $10.50.
>
> "You may be pleased to know, Mr. Chairman, that $10.50 also will buy a list of 84 doughnut bakers living in your home state of Connecticut. And that a Senator's name and address sells for about 15 cents, while a member of the House is only worth a nickel.
>
> "If one so desires, he can obtain a list of 212,000 attorneys, 99,000 dentists, and 259,000 doctors—all for about $25 per thousand."

While Congressman Zablocki's purpose and intent is the elimination of pornographic literature from the United States mails, it is clear that a mailing list does constitute a "thing of value."

On September 24, 1966, the New Yorker Magazine, published by the New Yorker Corporation, New York City, New York, published an article directly dealing with the commercial nature of such mailing lists (A. 67-101).

There have been no Board or Court decisions as to whether or not a list such as the Board seeks here is a

"thing of value." The issue is raised for the first time. If it is a thing of value, the action which the Board demands is clearly within the proscription of Section 302. Indeed, a question is raised as to whether the Board and its agents have not already violated Section 302(b).

It is no answer to the Company's position that the unions would not sell this list. What the unions could or would do with it once it is beyond the employer's control is not a matter of issue before this Court. The sole problem that must be resolved is whether or not the list constitutes a thing of value; and, on this issue, the Company has twice requested both the Regional Director and the National Labor Relations Board itself to hold a hearing to determine the validity of its purpose, and in each instance the Company's request has been completely ignored. The Courts, in construing Section 302, have clearly held that the proscription in Section 302 not only applies to the giving of money, but is applicable to "anything of value," and it is clearly applicable to both the employer and the employees' representatives. *Cf. United States* v. *Roth*, 333 F. 2d 450 (1964), cert. den. 380 U.S. 942 (1965), and its companion case, *United States* v. *Holt*, 333 F. 2d 455 (1964). See also *United States* v. *Schabert*, 362 F. 2d 369 (1966); *United States* v. *Ricciardi*, 357 F. 2d 91 (1966); *United States* v. *Kramer*, 355 F. 2d 891 (1966).

The District Court, in its opinion in the instant proceeding (A. 101-106), gave only cursory attention to the question of whether or not a mailing list was a thing of value. In response to an admission during oral argument by counsel for the Board, in which he admitted that a mailing list could be a thing of value, the Court said: "The possible value of such a list as a mailing list gives this contention some surface plausibility" (A. 106). The Court then dismissed this contention with a reference to *Zentner* v. *Ameri-*

can Federation of Musicians of the United States & Canada &c., 237 F. Supp. 457 (1965).

It is submitted that the application of that decision to the present proceeding is inappropriate. The issue involved in *Zentner* was based upon the right of a union to have the names and addresses of all of its members as they traveled around the country in order that it might properly police its collective bargaining agreements and wage standards.

It can readily be recognized that a union must have the names of its members in order properly to police and administer its own business, but it is submitted that no union is entitled to such information prior to the time when it is the recognized collective bargaining representative of employees. Further, *Zentner* is inappropriate to the present proceeding.

D. The Excelsior Rule is Invalid because it Violates the Constitutionally Protected Right of Privacy of the Employees of the Company.

The Board's stated purpose in espousing the *Excelsior* rule is to turn the list of the names and addresses of the employees over to the union or unions involved so that the unions may directly contact the employees either by mail, by telephone, or by personal visits to the employees' homes.

The idea that an employer must give to strangers the names and addresses of his employees is repugnant to our democratic right of privacy. The Board's statement that its policy is based upon a desire that both sides be given an opportunity to present their positions is patently absurd and begs the question of its companion argument that the purpose of the lists is to minimize challenges at the time of the election. The statute is barren of any requirement of the nature of the *Excelsior* case.

This Court in *Griswold* v. *Connecticut*, 381 U.S. 479, 484-485 (1965), strongly protested the invasion of an individual's right of privacy. It said:

> "The Fourth and Fifth Amendments were described in *Boyd* v. *United States*, 116 U. S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp* v. *Ohio*, 367 U. S. 643, 656, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'"

The Board's desire irresponsibly to publish the names and addresses of the employees is in direct conflict with the holding of this Court in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 462 (1958), wherein the Court said:

> "We think that the production order [for the names of the members of the NAACP in Alabama] . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."

It should be remembered that in the *Alabama* case the list of names and addresses was to be turned over to the state Attorney General for his use, and his use only. Certainly, it is a far cry from that situation to the situation where the Board intends, and proudly proclaims, that it will turn over the list to union officials for whatever purpose they seek to obtain.

One of the major bases upon which the Board founds its *Excelsior* decision is the fact that the giving of such lists will assist the Board and the parties to the election in re-

solving the eligibility of the employees to vote. The Board has for a long period of time required the employer, several days prior to the election, to submit to it a list of eligible voters. This list is then reviewed by the union or unions involved to determine whether the list is correct. The Board admits that on September 26, 1966, the employer did in fact submit such a list to the unions involved and the list was thoroughly reviewed by representatives of both unions (A. 32). However, the Board would have the Court believe that this is insufficient and that failure to supply to the unions both names and addresses of employees will cause numerous challenges when employees exercise their right to vote. This is a completely false and unwarranted assumption and is denied by the Tally of Ballots. The Tally indicated that of a total number of eligible voters of some 1,750, there were exactly 6 challenges. The number of ballots that were challenged in the election of September 29 amount to less than 0.5 per cent. It is clear, therefore, that the challenged ballots could in no way affect the results of the election; and it is further clearly demonstrated that the Company's failure to supply the *Excelsior* list in no way affected the number of challenges in the election."

IV.

The Unions had Adequate Means and Alternative Methods of Ascertaining the Employees' Names and Addresses.

The election conducted on September 29, 1967, was the fifth such election in which the Boilermakers had sought to gain recognition of the Company's employees (A. 101). During this period of time, the Boilermakers have constantly maintained an office and a staff in Worcester, Massachusetts. They have consistently subjected the Com-

pany's employees to organizational campaigns and requests for membership in their union. It would be completely naïve to presume for a moment that the Boilermakers during this period of time could not have established contact with each and every employee of the Company.

Over the course of the years, the Boilermakers, in addition to the usual organizational activity of distributing handbills and leaflets at the Company gates, have had innumerable meetings in and around Worcester. During past organizational campaigns, the Boilermakers have printed ads in the local Worcester newspapers. They have broadcast radio appeals on the local Worcester radio stations. In fact, during one campaign they published a telephone number which could be called by the employees of the Company to receive propaganda appeals during the day and night. This so-called "hot line" was carried out over an extended period of time and with full knowledge not only of all Wyman-Gordon employees but indeed of all the citizens of the Worcester area. Upon such a showing of ingenuity and initiative, it ill becomes the Board at this date to state that it is necessary that the Boilermakers receive from the Company a list of the names and addresses of the Company's employees.

In regard to the Steelworkers, and with equal application to the Boilermakers, there is available to anyone with the initiative to use it a City Directory of the Metropolitan Worcester area. This Directory can be purchased by anyone who desires to do so or it can be inspected in the Worcester public libraries by anyone who does not wish to pay the purchase price.

The City Directory lists all individuals living in metropolitan Worcester and indicates not only their home addresses but also their employer and the position which they hold with the employer (A. 50-52).

It is clear from the foregoing that the unions here had available to them sufficient sources of information in order actively to affect the type of campaign which the Board contemplates under the *Excelsior* rule. The failure of the unions to make use of these readily available, and varied and multiplicity of approaches does not warrant the implications imposed upon the employer in *Excelsior*.

Conclusion.

It is respectfully submitted that this Court should affirm the Court of Appeals in holding that the *Excelsior* rule is invalid because of the Board's failure to comply with the Administrative Procedure Act; and further that this Court should find that the *Excelsior* rule itself is invalid as exceeding the statutory authority of the Board to establish the rule and to enforce it through the subpoena powers of the District Court, or, in the alternative, to remand the case to the Court of Appeals for a ruling on the substantive issues presented, upon which the Court of Appeals failed to rule.

Respectfully submitted,

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February 12, 1969.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7000.

WYMAN-GORDON COMPANY ET AL.,
APPELLANTS,
v.
NATIONAL LABOR RELATIONS BOARD,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[270 F. Supp. 280]

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Quentin O. Young, with whom *Herrick, Smith, Donald, Farley & Ketchum* was on brief, for appellants.

Solomon I. Hirsh, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Bernard Dworski*, Attorney, were on brief, for appellee.

June 12, 1968.

ALDRICH, *Chief Judge*. This is an appeal from an order of the district court enforcing compliance with a National Labor Relations Board subpoena which ordered an em-

ployer to furnish names and addresses to its employees. The issuance of the subpoena stems from efforts of two unions, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Boilermakers), and the United Steelworkers of America, AFL-CIO (Steelworkers), to represent some 1750 production and maintenance employees at appellant's plants in three Massachusetts communities. The Board's Regional Director, after investigation and hearing, ordered an election and directed appellant, in accordance with the rule announced in *Excelsior Underwear, Inc.*, 1966, 156 N.L.R.B. 1236, to furnish the Board a list of the names and addresses of all employees eligible to vote. Appellant agreed to furnish a list of names, but refused to supply addresses. Notwithstanding this refusal, the election was held, resulting in 226 votes for the Boilermakers, 555 for the Steelworkers, and 903 against any union.

On objection by both unions, the Regional Director set aside the election and ordered a new one. The Board affirmed this decision. Again the Regional Director demanded an *Excelsior* list, and again appellant refused. The subpoena then issued. The Board filed a complaint seeking enforcement of the subpoena or, alternatively, a mandatory injunction directing appellant to comply with the *Excelsior* requirement. The district court ordered enforcement of the subpoena, and this appeal followed. By it appellant has launched a broadside attack against the *Excelsior* rule, challenging its substance, the procedure of its promulgation, and the statutory basis of the subpoena power invoked to enforce it.

The court is of one mind in not being greatly impressed by the arguments challenging the wisdom of the *Excelsior* rule, but this is a matter on which the majority of the court does not feel called upon to make a decision. We mention briefly the Board's concern in insuring an in-

formed employee electorate, and in balancing management's right of access to employees in the plant through the mails with a right on the part of unions—and anti-union employees—to have access to the addresses of a constantly changing roster of employees. It is unnecessary to repeat the Board's responses in *Excelsior* to the contentions that its authority to compel disclosure is limited to cases where other channels of information do not exist and that such compulsory disclosure invades the privacy of employees. Likewise we are not greatly impressed by the contention that compelling a list of names and addresses forces appellant to "interfere" with a labor organization, in violation of 29 U.S.C. § 158(a)(2), and to give a "thing of value" to a labor organization, in violation of 29 U.S.C. § 186. The former statute, as is indicated by the cases cited to us by appellant, is concerned with acts of favoritism. It is difficult to think that supplying the Board with information, pursuant to a Board order, which the Board will give to all persons alike who show a legitimate interest, would be considered a proscribed gift.

A threshhold question, however, is raised by appellant's claim that the *Excelsior* rule is invalid because, concededly, it was promulgated in disregard of the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C.A. §§ 552, 553.[1] In the opinion of the majority of the court this issue is determinative.

Events leading to the establishment of the rule grew out of two consolidated cases coming before the Board

[1] We are not here concerned with the effect of failure to publish rules, themselves properly arrived at, in compliance with 5 U.S.C.A. § 552(a)(1). In this respect we agree with the views of Judge Friendly speaking for the court in *United States* v. *Aarons*, 2 Cir., 1962, 310 F.2d 341, 347-48, that such rules are valid as against one with actual notice of them. See 1 Davis, Administrative Law § 6.10 (1958).

on union challenges of elections on the ground that the employers had refused to supply the unions with lists of names and addresses of employees so that the unions might answer a campaign letter sent by the company to the employees. Recognizing the problem to be one affecting more than just the parties before it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days.[2] In so doing we consider that the Board, to put it bluntly, designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest.

In presently justifying its position the Board does not seek to carve out for itself the special defense suggested by our brother Coffin in dissent, but asserts that what it did was proper administrative action approved by the Court in *SEC* v. *Chenery Corp.*, 1947, 332 U.S. 194. It is, of course, true that the Court there recognized that an adjudicatory administrative body may promulgate rules through decision as well as through more formal rulemaking procedures. This is a necessary and inevitable consequence of adjudication. Normally the Board must decide cases between party and party, as the Commission did in *Chenery*. The result, if stare decisis is to mean anything, is that any principle, once decided, stands as a guide for the future and may be spoken of as a rule. Examples are legion. Sometimes, until the Board spoke, all parties may have thought the "rule" was the other way. This may be unfortunate, but it is normally unavoidable, as *Chenery* demonstrates.

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[2] Thirty days is the period which must elapse between publication and effective date of a rule promulgated in accordance with APA procedures. 5 U.S.C.A. § 553(d).

In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress.

Although the first time in this circuit, this is neither the first nor the most severe instance of Board action approximating contravention of the APA in this manner. It has been long and severely criticized, *e.g.*, Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961); 1 Davis, Administrative Law § 6.13 (Supp. 1967), with no apparent effect. We regret that the matter comes before us in connection with a rule to which we see little or no objection and for which there is much to be said. Yet, to blink at this procedure in this instance because we may approve of the result, we believe would be neither honest nor wise.[3] Congress provided no exception in the APA for rules improperly promulgated, but which some court, in a case between the agency and some individual, was persuaded were sound. To recognize such an exception would be to emasculate the statute.

We read Judge Coffin's dissent as disagreeing on this matter only in that he believes the rule promulgated to be "procedural" within the APA definition and therefore not

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[3] We are not unmindful that two circuits have supported the *Excelsior* rule. *NLRB* v. *Rohlen*, 7 Cir., 1967, 385 F.2d 52; *NLRB* v. *Hanes Corp.*, 4 Cir., 1967, 384 F.2d 188, *cert. denied* 390 U.S. 950. However, so far as appears, the Board's failure to comply with the APA was not brought to the courts' attention. The courts were concerned with whether the substance of the rule was within the Board's rule-making power, not whether it was properly adopted.

subject to the requirement that advance notice of the intended rulemaking, and the substance of the rule, be given and that interested parties be afforded an opportunity to comment. 5 U.S.C.A. § 553. If the rule related simply to the mechanics of conducting an election, to superintending or checking the voters, we would agree. The *Excelsior* opinion makes the suggestion that this is one of the purposes. 156 N.L.R.B., *supra,* at 1242-43. However, the Board's decision effectively contradicts its own declaration. The Board already had a valid rule requiring the employer to furnish a checklist. The additional requirement of the *Excelsior* rule is expressly stated not to apply when the time interval is "too brief . . . for the union to be able to make any meaningful use of this information." *Id* at 1242, fn. 14. We can only conclude that *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.

Such assistance is substance, not Board procedure. It differs only in degree and not in kind from a requirement, for example, that an employer having an assembly hall or a printing press should make it available to groups requesting it. The Board's contentions that furnishing a mailing list is not expensive or seriously burdensome, or is required only because the union has no effective substitute, may well be justifications for the rule, but they do not change its character. Judge Coffin's emphasis on the relative lack of burden, and comparing the compilation of the list with affording space on a bulletin board, suggests factual determinations in each case that seem to us unnecessary at best. His desire to resolve questions of doubt in favor of a procedural label loses importance to us when one considers that its only purpose is to avoid affording interested parties an opportunity to present their views as to what is, quite apparently, a controversial rule.

It is also true that compliance with the rule may well increase the fairness of the election. This, however, is a conclusory argument. Many actions by the employer may add to the fairness of the election. This does not mean that ordering them to be done is procedural. We are particularly unmoved by our brother Coffin's suggestion that the fact the rule sets up a positive as distinguished from a negative requirement is indicative that it is not substantive.

The judgment of the district court is set aside and the court is ordered to dismiss the complaint.

COFFIN, *Circuit Judge* (dissenting). For the purpose of deciding the applicability of the notice provision of the Administrative Procedure Act, 5 U.S.C.A. § 1003(a), I view the *Excelsior* rule as procedural and thus valid despite absence of advance notice. I recognize that this is a ground not relied on by the Board, which seemed to assert a standard defense to a standard assault. But the same shoe fits both parties, for the distinction which divides this court was obviously far from the concern of appellant, which said in its brief, ". . . . it is clear the Board recognized that it was establishing a new rule or procedure in the conduct of election proceedings under Section 9 of the Act."

The legislative history suggests to me that in grey areas doubt about the nature of a rule should be resolved in favor of applying the procedural label. In the first place, the few attempts to define terms equate substantive rules with "rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards", Attorney General's Manual on the A.P.A. (1947) 13 n. 5, or with rules "other than organizational or procedural . . . which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to . . . 15 U.S.C. 78n." Manual, *supra* at 30. I

read the language and these examples as giving restrictive rather than expansive meanings to "substantive rule".

In addition, the Senate Committee on the Judiciary made clear that in exempting procedural rules from the notice requirement it was seeking to encourage such rules because "those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned." Legis. Hist. of the A.P.A. (1946), 18, 313.

The *Excelsior* rule itself seems to me to be clearly on the procedural side. It sets up a positive requirement of furnishing addresses as well as names of employees, to be applicable in every election. In this respect it differs from the proscription of selectively directed acts of coercion which are more appropriately accomplished through the unfair labor practice procedures.

That the requirement looks toward action the effect of which reaches beyond relations between a party and the Board ought not to be a controlling consideration, any more than it is with reference to the requirement in 29 C.F.R. § 101.19 (the Board's "Statements of Procedure" governing elections) that elections "be adequately publicized by the posting of official notices in the establishment. . . ." Indeed, the natural home of the *Excelsior* rule would seem to be in § 101.19.[1]

It is also, I think, a factor of relevance to the substance vs. procedure issue that the burden on the employer's time,

[1] All of this only refers to the primary objective of *Excelsior*, to achieve better elections. The fact that a secondary purpose, the expeditious handling of challenges of voter eligibility, is uncontrovertedly procedural is an added factor of some significance. While a procedural secondary rule could not save a rule otherwise clearly substantive, it would seem that a primary purpose of ambiguous effect might be aided, insofar as notice is concerned, by such a secondary purpose.

efforts, or property in being compelled to furnish addresses of employees is inconsequential. I do not share the court's conclusion that this requirement "differs only in degree and not in kind" from one that would force an employer to make an assembly hall available on request. I would say that we are dealing with a dichotomy where difference in degree can result in a difference of kind or difference in categorization. This, I think, is illustrated by the above noted procedural requirement that notices of election be posted "in the establishment"—in itself a minimal encroachment on the employer's domain.

While it may be that forcing employers to share with unions their previous monopoly on knowledge of addresses may have a net result of strengthening union power generally, such a result cannot be said to alter substantive "rights" unless the employer's prior easy access to addresses rises to the dignity of a right. *Cf. Sibbach* v. *Wilson*, 312 U.S. 1, 14 (1941). Moreover, the *Excelsior* rule by its terms applies to "all parties"—which include employees hostile to a new union or seeking decertification of an old one. *Cf. Wallace Murray Co.*, 1968-1 CCH NLRB Dec. ¶ 22,256.

I would, for the above reasons, hold that the *Excelsior* rule was valid. But this would not have been an end to the case. There remains the difficult question—how, if at all, can *Excelsior* be properly enforced?[2] The district court ordered that the subpoena be honored. The Board's power lies in the statutory language granting "the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. . . ." 29 U.S.C.A. § 161(1).

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[2] While what follows goes beyond the issue which divides the court, the writer feels obliged to explore the problem of enforcement which has led to conflicting and often strained statutory interpretation.

The authorities which have upheld the subpoena power as available to procure an *Excelsior* list [3] have defined the proceedings leading to representation certification as an investigation and have tortured the concept of "evidence" into something which is helpful in "facilitating a fully informed electorate". *NLRB* v. *Rohlen, supra* at 57. A scrutiny of 29 U.S.C.A. § 161 yields the impression that "evidence" is used throughout in its more traditional sense as data relevant to the proof of a fact in issue.[4] I am sympathetic with the courts which have not been willing to make this leap. *NLRB* v. *Q-T Shoe Co.*, Civil No. 140-67 (D. N.J., filed Jan. 19, 1968); *NLRB* v. *Montgomery Ward, Inc.*, 54 CCH Lab. Cas. ¶ 11659 (M.D. Fla. 1967).

A second solution, suggested by *Q-T Shoe Co., supra,* is that the only way to enforce the *Excelsior* rule is first to secure a determination that refusal by an employer to pro-

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[3] *NLRB* v. *Rohlen,* 385 F.2d 52 (7th Cir. 1967); *NLRB* v. *Hanes Corp.*, 384 F.2d 188 (4th Cir. 1968), *cert. denied* March 4, 1968; *NLRB* v. *British Auto Parts,* 266 F. Supp. 368 (C.D. Cal. 1967); *Swift* v. *Solien,* 56 CCH Lab. Cas. ¶ 12140 (E.D. Mo. 1967); *NLRB* v. *Teledyne, Inc.*, 56 CCH Lab. Cas. ¶ 12229 (N.D. Cal. 1967); *NLRB* v. *Beech-Nut, Inc.*, 56 CCH Lab. Cas. ¶ 12237 (S.D. N.Y. 1967).

[4] A similar approach would be to define more narrowly the particular "investigation" as the quest for the names and addresses of the employees. With this frame of reference, the list of such names and addresses could be considered more traditionally as "evidence" relevant to the proof of the object of the investigation. Indeed the subpoena served on appellant contemplated a hearing before the Regional Director at which appellant's president was to testify from corporate books and records concerning the names and addresses of employees. In lieu of such books, a list would be received but only after Board agents had "verified its contents by examination of the subpoenaed books and records". In short, the list is arguably evidence tending to establish the true names and addresses being sought. The difficulty with this approach is that it tortures the word "investigation" into something quite different from its use in 29 U.S.C.A. § 159.

vide a list of names and addresses of employees constitutes an unfair labor practice under 29 U.S.C.A. § 158(a)(1), and then to seek the aid of the court under 29 U.S.C.A. § 160(e). This would seem plausible until the statutory definitions of unfair labor practices are examined. The Board in *Excelsior* wisely refrained from saying whether refusal to disclose names and addresses of employees would constitute "interference, restraint, or coercion" within the meaning of 29 U.S.C.A. § 158(a)(1). I would say that it is at least doubtful that any one of the effective verbs would cover such a case. "Interfere" is the most adaptable, but its entire thrust is aggressive, not passive. According to Webster's International Dictionary (3d int. ed. 1961), it means such things as "intervene", "intermeddle", and "interpose".

It cannot be said with assurance that a refusal to respond to the *Excelsior* rule—unless, perhaps, a repeated refusal—would predictably be denominated an unfair labor practice.[5] Moreover, constant litigation would ensue over the issue whether, in a given case, the refusal to provide a list had any effect at all on the representation proceeding. For example, in the case at bar appellant moved to quash the subpoena, citing as one ground that the unions already had employee mailing lists.

This leads to the remaining mode of enforcing the rule, if indeed there is any way at all. This is the injunction. The Congress has indicated by statute that the Board has authority to prescribe "regulations and rules of decision" governing consent elections. 29 U.S.C.A. § 159(c)(4). The Supreme Court has made it clear that "The control of the election proceeding, and the determination of the steps

[5] I would add that I would prefer some lesser sanction for enforcement of procedural rules than that stemming from an unfair labor practice proceeding.

necessary to conduct that election fairly . . . [are] matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

While there is a step between statute and rule, not present in *United States* v. *Feaster*, 330 F.2d 671 (5th Cir. 1964), I see no difference in principle. If, in *Feaster*, the statutory right to have access to books and records supported an injunction compelling access to names, addresses, and job classifications of employees, so here a rule predicated on statutory authority to regulate elections and carrying out Congressional policy should support the same remedy. Or, to go back to the observation in *Walling* v. *Brooklyn Braid Co.*, 152 F.2d 938, 941 (2d Cir. 1945), we should "consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted."

Assuming, therefore, the validity of the *Excelsior* rule, I see no other certain way in which it can be enforced than by injunction. And while the absence of other remedy is no adequate justification for judicial invention, I feel that enforcement of the rule lies well within the equity powers of the district court. I would therefore remand the case for consideration of the Board's alternative prayer for an injunction.

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In the Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 463.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
WYMAN-GORDON COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

The Respondent in the above-entitled cause respectfully moves this Court for leave to file the accompanying Supplemental Brief, pursuant to Rule 41(5). Both the Petitioner and the Solicitor General have advised Respondent that they have no objection to the filing of this Supplemental Brief.

In support of this motion Respondent shows that since the filing of its Brief and argument before the Court, material originally submitted to the Ervin Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, regarding its investigation of the National Labor Relations Board was first made public. This material is reported at 39 Daily Labor Report, pp. D-1 *et seq.*, and

includes a memorandum most relevant to this cause written by James R. Wason, Specialist in Labor Economics and Relations, Economics Division, Legislative Reference Service, Library of Congress, and prepared at the request of Hon. Sam J. Ervin, Jr., and Hon. Everett McKinley Dirksen.

The above described material was published on February 27, 1969 and was not received by Respondent until March 4, 1969. Because this information was not available in time to have been included in Respondent's Brief in chief, or in its argument, and because Respondent desires to bring this information to the attention of this Court, Respondent seeks leave to file this Supplemental Brief.

Conclusion.

For the foregoing reasons, this motion for leave to file a Supplemental Brief should be granted.

Respectfully submitted,

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March 7, 1969.

In the Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 463.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
WYMAN-GORDON COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

During the Ninetieth Session of Congress during 1968, Sen. Samuel J. Ervin, Jr., as chairman of a special subcommittee on separation of powers, a part of the Government Operations Committee, conducted numerous hearings in regard to the administration of the National Labor Relations Act by the National Labor Relations Board. This subcommittee's report has not as yet been issued, but on February 27, 1969, this subcommittee did issue certain memoranda of law which were supplied to the subcommittee by the Library of Congress Legislative Reference Service.

Among the memoranda was one prepared by James R. Wason, Specialist in Labor Economics and Relations, Economics Division, Legislative Reference Service, Library of Congress, dated March 22, 1968 (see Appendix).

The conclusions set forth in this memorandum are particularly pertinent to the issues in the instant proceeding. Mr. Wason poses the following problem:

> "What does the analysis suggest might be done to meet the more fundamental criticism? How can labor and management know better what is expected of each under the Labor-Management Relations Act? How can both secure justice, swift and sure, under its provisions?"

In a partial response to the situation, the memorandum says:

> "The examination which has been made suggests the conclusion that the main reason justice is delayed under the Act is because justice under the Act is not sure. The Board has failed to make clear to labor and to management what it thinks the Act requires. It has created a lawyers' paradise and a legal nightmare of endless rows of case decisions. It makes policy by rummaging among these, selecting and modifying precedents to suit its current requirements. And under our judicial procedure, this manufacture of policy by basing on, developing, and departing from prior precedent is accepted as being standard judicial practice, as, indeed, it is." (Footnote omitted.)

In conclusion, the memorandum says:

> "Our suggestion, and our second point, is that the Board should codify its opinions and reduce them to a series of regulatory bulletins. It does not have to make law, case by case. It could work out its policy, put it in the form of regulations, run them through the Administrative Procedure Act, and put them out for every

member of labor and management to read. After thirty years they are, save for new situations, established. They need only be codified.

"'These bulletins will spell out for all to understand just what our labor policy is under the Act. The regulations could be followed up by the issuance of interpretative bulletins, informative releases, and, if desired (it is certainly needed), a nationwide informational campaign to tell labor and management of their rights and duties under the Act. It might thus fill the informational gap which exists today between the decisions of the Board and the very informative speeches, delivered only to small groups of labor experts, by the Board's members and the General Counsel.

"'By codifying its requirements, the Board would, of course, divest itself of much of its case load. An employer or a labor leader reading in a regulation what the Board expects will find he need consult his attorney only to make certain he is living up to the requirements of the law, not to find out what they are. The law should be made accessible to those who are required to live by it and whose rights depend upon its meaning. Employees and employers should not be required to go to court to find out what their rights are.''

It is respectfully submitted that the errors of the National Labor Relations Board in promulgating the *Excelsior* rule by an *ad hoc* adjudication rather than the exercise of its rule-making powers under the Administrative Procedure Act are within the direct thrust of the recommendations contained in the memorandum of Mr. Wason.

While the memorandum to the Committee on Separation of Powers suggests legislative action to require the Board

to make complete use of its rule-making powers under the Administrative Procedure Act, it is respectfully submitted that this Court has similar powers to require the Board to follow the Administrative Procedure Act by adopting the decision of the Court below in the instant proceeding.

Respectfully submitted,

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March 7, 1969.

Appendix.

The National Labor Relations Act and the National Labor Relations Board

PREPARED AT THE REQUEST OF HON. SAM J. ERVIN, JR. AND HON. EVERETT MCKINLEY DIRKSEN

(By James R. Wason, Specialist in Labor Economics and Relations, Economics Division, Legislative Reference Service, Library of Congress, March 22, 1968)

Introduction

Justice, to be effective, must be both swift and sure. This, in effect, was the rule laid down in the 18th century by one of the first criminologists, Cesare Beccaria:

"The more immediately after the commission of a crime, a punishment is inflicted, the more just and useful it will be."

"Crimes are more effectually prevented by the *certainty* than by the *severity* of punishment."

The quotations are taken from pages 74 and 98 of the 3rd edition of an English translation of his *Essay on Crime and Punishment,* printed in London in 1770.

On this score the National Labor Relations Act is to be faulted. It does not afford either a sure guide to labor-management relations nor are proceedings under it productive of swift justice.

Such, at least, are the conclusions reached after an extended consideration of the history of the Act in its various forms and under its various administrators. (See Part II below.) The problem is here deliberately posed, however, as one concerning the National Labor Relations Act, not the National Labor Relations Board. There have

been many Boards. Some have been accused of having favored labor and some management; none have ever escaped such criticism. But as the survey will show, the criticism of true bias has seldom been sustained. Few Boards did not in the course of their deliberations sooner or later experience criticism of bias from both labor and management; indeed, the responsibilities of the Board are such that criticism is to be expected of any Board which is doing its job.

It is not the expected charge of bias which is most significant to the present examination of the work of the Board. Rather, it is the persistent underlying criticisms which go back to the origins of the Act in the deliberations of the Board's predecessor agencies before the enactment of the Wagner Act. (See Part III below.) First is the repeated complaint that the Act does not provide a certain mandate for those who are required to conduct their affairs in accordance with its provisions. Second, that in administering the Act, the Board is not only uncertain in its deliberations, but slow, and that implementation of its findings are so delayed that they lose much of their effect.

There is, to be sure, a degree of bias connected with these underlying critical themes. That the justice afforded under the Act is not sure has been most frequently asserted by the spokesmen for management. That it is delayed, weak, and uncertain in its remedy has been more often claimed by labor. However, neither side has ignored either charge. More important, it is these criticisms of the workings of the law which most concern us here where the means to the ends of the law, not the ends themselves, are our primary concern. How can these means be better made to serve these ends? (See Part IV below.)

I. THE NATIONAL LABOR RELATIONS ACT AND THE SEPARATION OF POWERS

Before turning to the history of the Act, it may serve to avoid some confusion to examine the question of how the question of separation of powers arises in the administration of the Act.

We shall not go deeply into the areas of constitutional law and legal philosophy involved. The doctrine of the separation of powers arises under our Constitution primarily by the division of responsibility between our legislative, executive, and judicial bodies. However, the Constitution provides also for checks and balances—that is to say, it makes each branch of our government the guardian of the rights of citizens with respect to the exercise of power by each other branch, by enabling each to resist, at least to a degree, encroachment on its own powers. Each checks the other.

Separation of powers can then be seen as a process of conflict, with each branch at once standing off all other branches in their assault on its powers while at the same time, in that defense, encroaching on the assumed area of responsibility of each other branch. Such an approach is necessary if public rights are to be protected; each branch claims to serve the public interest by curbing each other branch, thus having all such encroachments on the public appear first as threats to its own authority. Then, in defending itself, each branch defends the public.

The analogy of the principle expressed here to the idea that out of competition comes economic efficiency will appeal to any economist. More generally, the biological principle of the competition of individuals underlying the preservation of species will be recalled by some readers.

Out of this simple principle of the separation of powers have arisen serious problems of how complex problems of

governmental regulation are to be accomplished where more than one branch of government had a role to play in their solution. The dilemma has been resolved by development of the concept of the regulatory commission to which is delegated by Congress elements of the authority exercised by each branch of the government.

That the Congress has the authority to make such a delegation indicates that, in the allocation of governing power, Congress is supreme. The corollary of possession of such power of delegation is the accompanying responsibility for the Congress to exercise, through the process of legislative oversight, control over the exercise of these delegated powers in accordance with its intent in making the delegation.

The problems connected with the Congressional oversight of the members of what has been called the "headless fourth branch" of the government are well known. Regulatory commissions are not subject to effective executive supervision. They may be subject to judicial control, but because of their quasi-judicial nature, the control may not be as objective as with a more purely executive agency. A presumption of juridically correct construction may inhibit the courts. As "arms" of the Congress and its creation, their control devolves then more upon the Congress. The ordinary checks and balances are not present to the same degree as in the other branches without such commissions.

The methods by which Congress may control the regulatory commissions are:

(1) Through the power of the Senate to reject nominees to the commissions;

(2) By prescribing the terms and qualifications of members and limiting the authority of the President to remove them;

(3) By the annual review of the actions of commissions during the appropriations hearings;

(4) By amendment of the statutes; and

(5) By the exercise of legislative oversight by supervisory committes.[1]

It is with the last of these that we are here concerned.

It may surprise some to have the National Labor Relations Board referred to as a "regulatory commission." However, it *is* a regulatory commission and has been considered to be such since its inception. For example, the Hoover Commission task force report on *Regulatory Commissions*, January 1949[2] lists it among the ten independent regulatory agencies at the time, together with the Interstate Commerce Commission, the Maritime Commission, the Civil Aeronautics Board, the Federal Power Commission, the Federal Communications Commission, the Securities and Exchange Commission, the Federal Reserve Board, the Federal Trade Commission, and the Atomic Energy Commission.

There were and are other regulatory agencies within departments, such as the Food and Drug Administration in the Department of Health, Education, and Welfare and the Wage and Hour and Public Contracts Divisions in the Department of Labor, but these ten are the ones usually considered the *independent* regulatory agencies.

These agencies have been set up at different times for differing purposes covering many areas of economic and social activity. What they have in common is that they have been established by the Congress to protect the public interest and serve the general welfare. The means used

[1] George B. Galloway. The Legislative Process in Congress, New York, 1953, p. 87.

[2] Commission on the Organization of the Executive Branch of the Government. Task Force Report on Regulatory Commissions. U.S. Government Printing Office, 1949.

to accomplish these ends has been to delegate to each agency substantial power to issue the regulations and orders it deems necessary to carry out the provisions of the statute establishing the agency. Thus, Section 6 of the Labor Management Relations Act, 1947, reads as follows:

"The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act."

II. THE NATIONAL LABOR RELATIONS BOARD AND ITS CRITICS[3]

A. *From 1938 to Taft-Hartley*

The National Labor Relations Act (Wagner Act), as it exists today in amended form, is Title I of the Labor-Management Relations Act, 1947, commonly known as the Taft-Hartley law. When the Wagner Act was enacted in 1935, it had little support from any sources other than Congress and, apparently, the people. Management opposed it. Some contemporary unions apparently felt there might be an adverse effect of some of the provisions of the bill upon the structure of their organizations. Indeed, the bill did not receive the full support of President Roosevelt and other high-ranking members of his Administration.[4]

Shortly after its passage and before the work of the new agency could get under way, the National Lawyers Com-

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[3] This section borrows liberally from the two following articles by Gene S. Booker and Alan C. Coe: "The NLRB and Its Critics." *Labor Law Journal*, v. 17, No. 9 (September 1966); and "The Labor Board and Its Reformers," *op. cit.*, v. 18, No. 2 (February 1967).

[4] Leon H. Keyserling "The Wagner Act: Its Origin and Current Significance," *George Washington Law Review*, v. 29, No. 2 (December 1960), p. 202.

mittee of the American Liberty League issued a 132-page "Report on the Constitutionality of the National Labor Relations Act." This brief asserting the law's unconstitutionality was sponsored by 58 lawyers, all men of distinction and success, coming from all parts of the United States. Their number included a former Attorney General and two former Solicitors General of the United States. The result was that, as might be expected, until the constitutionality of the law was finally resolved in April of 1937,[5] enforcement of its provisions was a practical impossibility. Thus, for the first two years of its life, the criticisms of the Board were lost in the denunciation of the "unconstitutional" Act.

It was during this initial period, however, that the event took place which conditioned the direction of the substantive criticism of the Board in the period down to the onset of World War II. This was the split in the American labor movement. When the law was enacted in July of 1935, there was one labor movement—the AFL. In November of that year, there were two—the AFL and the CIO. A basic duty of the Board was to determine which labor unions were appropriate units for collective bargaining purposes under Section 9(b) of the Act. But in any given case the Board would have to offend the AFL if their decision favored more the position of the CIO, and vice versa.

Initially, the Board ruled on the Globe case[6] that employees could select a craft unit to represent them even if it meant establishment of a separate bargaining unit. This ruling pleased the AFL and craft unions generally. But

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[5] In a series of five decisions: *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *NLRB* v. *Fruehauf Trailer Co.*, 301 U.S. 49; *NLRB* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58; *Associated Press* v. *NLRB*, 301 U.S. 103; and *Washington, Virginia and Maryland Coach Co.* v. *NLRB*, 301 U.S. 142, all 1937.

[6] Globe Machine and Stamping Co., 3 NLRB 294 (1937).

in 1939 in the American Can Company case [7] the Board reversed itself and ruled that craft units might not separate from an industrial unit if the craft workers were integrated into that unit. Neither the AFL nor business liked this ruling which strengthened the CIO and large industrial unions.

These are by no means the only cases bearing on the inter-union rivalry of the AFL and the CIO in this period. Nor was the American Can Co. case the final word of the Board with respect to craft severance.[8] But the problem facing the Board was clearly that no matter how it ruled it was criticized.

Out of these charges of bias came much of the initial impetus for Congressional action to amend the National Labor Relations Act or to investigate the National Labor Relations Board. Hearings were held in 1939 and 1940 by the House Committee on Labor, the Senate Committee on Education and Labor and, more significantly, by the so-called "Smith committee," the House Special Committee to Investigate the NLRB.[9]

While much of the scope of these hearings concerned charges of bias, communism, and one-sided administration of the law, the substance of the criticisms which received the most serious consideration by the Congress in these years concerned a problem which involved the question of the separation of powers. The Act provided that the NLRB was to be solely responsible for the investigation, prosecution and adjudication of unfair labor practice cases,

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[7] American Can Co., 13 NLRB 1252 (1939).

[8] International Minerals and Chemical Corp., 71 NLRB 878 (1946).

[9] U.S. Congress, House of Representatives, Special Committee to Investigate the National Labor Relations Board. *Hearings, National Labor Relations Act,* 76th Congress, 2d session, 1939.

which constituted the heart of Board responsibility. There was much criticism of the Board's handling of this multiple responsibility.

One bill, S. 1398, introduced as early as 1939 by Senator Holman, addressed itself to the problem of separating the prosecuting and adjudicating functions of the Board. It proposed to do this by creating a Labor Relations Commissioner in the Department of Labor to investigate and prosecute charges before a Labor Appeals Board. The introduction of this bill followed upon the support at their 1938 annual convention by the AFL of the principle of separating the administrative from the judicial functions of the Board.

The Smith committee reported a bill, H.R. 8813, in March of 1940 which provided for the establishment of an independent administrator to investigate and to prosecute unfair labor practice charges before the Board. The bill, with some amendments requested by the AFL, passed the House in June of 1940. However, the Senate Committee on Education and Labor took no action to report the bill and it died in committee. In part this failure to act reflected opposition to the bill, and in part it reflected a feeling that the then pending Walter-Logan bill [10] establishing a code of procedure for all administrative agencies would take care of some of the administrative problems under the NLRA.

None of these cited hearings were, however, the first to examine the operations of the Board and the administrative problems arising under the Act. The first hearings were held in 1938 by a subcommittee (appointed for the purpose) of the Senate Committee on the Judiciary, under the chair-

[10] This eventually became the basis for the Administrative Procedure Act of 1946 (60 Stat. 237).

manship of Senator Neely.[11] This subcommittee considered a resolution, Senate Resolution 207, introduced in the 3rd session of the 75th Congress by Senator Burke. This resolution charged the Board with "continuous and flagrant violation of the will of the Congress" and with having failed to have conducted its proceedings "in the impartial manner required by a body exercising judicial or quasi-judicial powers . . . ." and asked for an investigation of the Board.

After hearing Senator Burke, Chairman Madden of the Board, and Senator Thomas, chairman of the Senate Committee on Education and Labor, the subcommittee voted to report the resolution to the full committee adversely, on the grounds that any investigation of the National Labor Relations Board should not be conducted by the Judiciary Committee. In this it was sustained by the full committee, including Senator Burke himself.

One piece of information brought out at the hearings undoubtedly lent substantial weight to the decision of the committee not to press for an investigation. In addition to being able to point to the favorable decisions of the Supreme Court sustaining the Act, it was also brought out by Chairman Madden that the Board had been sustained in 21 out of 23 cases decided by Circuit Courts of Appeal, and in 96 out of 97 cases filed in District Courts.

The latter cases were especially convincing. All involved efforts to prevent the functioning of the Board by filing requests for injunctions in the District Courts. Despite the fact that the Act gave jurisdiction to review Board proceedings only to the Circuit Courts, the District Courts had accepted jurisdiction in these cases.

In about 40 cases preliminary restraining orders were granted by the District Courts. In 20 cases injunctions

[11] U.S. Congress. Senate. A Subcommittee of the Committee on the Judiciary. *Hearings, Investigation of the National Labor Relations Board*, 75th Congress, 3d session, 1938.

were issued, so that appeals by the Board were necessary. In 15 cases petitions for certiorari were made to the Supreme Court. The Supreme Court sustained the Board in its interpretation that the District Courts were without jurisdiction in every case. Clearly, whatever might be said about the bias of the Board, in its exercise of the powers granted it by the Congress, it was being upheld by the courts.[12]

The criticisms made both in and out of Congress of the lack of an internal separation of functions led to administrative changes by the Board itself in the early 1940's, which were designed to accomplish such a separation. The need had been further pointed up by the recommendations to this effect by the Attorney General's Committee on Administrative Procedures.[13]

Staff personnel were divided between those engaged in decision making and those engaged in investigating and prosecuting. Board members were removed from the prosecuting functions. In the Regional Offices of the Board, investigating and prosecuting functions were separated from those dealing with representation elections. Complaints were to be issued only by Regional Directors. Hearings were to be conducted only by Trial Examiners assigned from Washington.

These changes were sufficiently successful in meeting the suggested standards that when the Administrative Procedures Act [14] was passed in 1946, the Board was able to meet the Act's requirements for internal separation of functions by making only minor adjustments in its procedures.

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[12] *Ibid.*, p. 59.

[13] U.S. Congress. Senate. Attorney General's Committee on Administrative Procedures. *Final Report*, Senate Doc. No. 8, 77th Congress, 1st session, p. 158–160.

[14] See footnote 10.

These changes did not satisfy the critics of the Board, however.

During the war many proposals had been advanced to abolish the Board and divide its functions among two or more agencies. Most of these followed along the lines of the original Smith bill, cited above. In the 79th Congress there was, for example, the Hatch-Burton-Ball bill, S. 1171. This would have abolished the NLRB and established a five-member Federal Labor Relations Board to determine representation and certification issues. Disputes over unfair labor practices would be investigated and adjudicated by an Unfair Labor Practices Tribunal.

Representative Smith reintroduced his bill in the 80th Congress as H.R. 8. This would have provided for an independent administrator to investigate and prosecute cases before the Board. A bill introduced by Senator Ball, S. 360, would have given all investigating and prosecuting functions to an Assistant Attorney General in the Justice Department. Other proposals were discussed which would have had the NLRB act only as a fact-finding agency and judicial body and would have given enforcement and prosecution under the Act to the Department of Labor.

The most important bills in the 80th Congress were, of course, those which culminated in the Taft-Hartley Act—Representative Hartley's bill, H.R. 3020, and Senator Taft's bill, S. 1126. As passed by the House, the Hartley bill would have abolished the National Labor Relations Board and divided its functions. An independent administrator would investigate cases and prosecute them before a quasi-judicial Labor-Management Relations Board. Senator Taft's bill made only relatively minor changes in the administration of the Act.

The result was the compromise establishing within the Board the Office of General Counsel. This official was

given the authority to issue complaints and prosecute cases before the Board. This was one of two major administrative changes in the Act which came out of the major revisions made by the Taft-Hartley amendments.[15] The attention of the Congress, and, indeed, the country, had been on the substantive changes: the addition of unfair labor practices by labor to the law, and the problem of handling emergency strikes.

Apparently, too little consideration was given to the fact that procedural delays in the law would from now on harm not only the rights of workers to organize, but also the rights of workers to refrain from organization, and the rights of management to be protected from the illegal acts of unions.

B. *From Taft-Hartley to Landrum-Griffin*

The problem of oversight under the amended Act were considered as early as 1949 in the Task Force Report on Regulatory Commissions of the Hoover Commission. The position of General Counsel was noted as being independent not only of the Board but of any other agency of the government. The Report recommended that a Council of Labor be established under the Secretary of Labor which would include in its membership the General Counsel.[16]

This was followed by proposals in both Houses of the 81st Congress to abolish the office of General Counsel. The proposal passed the Senate and was favorably reported in the House, but was not acted on further and did not be-

[15] P.L. 101, 80th Congress, 1st session (June 23, 1947). The other, the increase in the size of the Board from three to five members, had little effect on administrative procedures.

[16] Commission on Organization of the Executive Branch of the Government. *Task Force Report on Regulatory Commissions.* Appendix N, Part XIII, January 1949, p. 140–141.

come law.[17] The reasoning of the committees reporting the bills was that internal separation of powers of the agency was guaranteed by the Administrative Procedures Act and that the position of General Counsel was not needed.

In the 2d session of the 81st Congress, Reorganization Plan 12 was forwarded by the White House. The plan would have abolished the Office of General Counsel and transferred its functions to the Board and its chairman.[18] The Senate rejected the plan. Senator Taft, however, introduced S. 3339 as a substitute for Plan 12. This would have created an independent executive agency, the Office of the Administrator of the NLRA. This bill was not acted on. Senator Taft included essentially the same proposal in his 1953 amendments. The new office would have had complete authority to receive and prosecute unfair-practice charges and representation petitions and the conduct of representation elections. He would also have had complete authority over all NLRB personnel. The Board enlarged to seven would have become more like a labor court in its operations.[19] These proposals received support from management representatives, as Reorganization Plan 12 had received support from labor, but no action was taken.

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[17] U.S. Congress. House of Representatives. Committee on Education and Labor. *National Labor Relations Act of 1949*, Report No. 317, 81st Congress, 1st session; U.S. Congress. Senate. Committee on Labor and Public Welfare. *National Labor Relations Act of 1949*, Report No. 99, 81st Congress, 1st session.

[18] Reorganization Plan No. 12 of 1950, transmitted to the Senate and House on March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, 81st Congress, 1st session. Rejected by S. Res. 248, 81st Congress, 2d session.

[19] Senator Taft introduced a series of bills amending the Taft-Hartley Act in 1953. These included S. 655, S. 656, S. 657 and S. 659, 83rd Congress, 1st session. The bill which made the administrative changes was S. 659.

The Task Force on Legal Service and Procedure of the second Hoover Commission noted in its report in 1955 that controversies between the Board and the General Counsel had hampered the enforcement of the Act. It recommended that the General Counsel be made responsible to the Board and that the problem of internal separation of powers be secured by strengthening the Administrative Procedures Act.[20]

One major problem which arose with the division of responsibility between the Board and the General Counsel was the question of who should issue complaints. The Taft-Hartley amendments had given the General Counsel, at section 3(d), "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints." Authority to issue complaints was delegated to the Regional Directors of the Board, but there was no appeal from a refusal by the Directors to act, save to the General Counsel himself. As early as 1949 the House Committee on Education and Labor had noted that, by refusing to issue a complaint, the General Counsel could control the kind of cases which would be heard by the Board. It was thus felt that he was infringing in the determination of labor policy, a responsibility which had been delegated by the Congress to the Board, not to the General Counsel.

The solution demanded was for the establishment of an appeals procedure. This proposal was supported by the 1949 Hoover Commission Task Force [21] but, as noted, no action was taken. Subsequently other proposals were made, short of appeal, such as a suggestion from the House of Delegates of the American Bar Association in 1958 that,

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[20] Task Force on Legal Service and Procedure. *Report on Legal Services and Procedure.* Prepared for the Commission on the Organization of the Executive Branch of the Government, March 1955, p. 281.

[21] See footnote 16.

when a complaint was dismissed, a detailed statement of explanation would be required.

The question of delay in the adjudication of unfair labor practice cases and in the determination of representation issues is one which has received much attention in the period since 1959 and will be considered more extensively below. In the early days of the Act, it was accepted to a degree that a backlog of cases would normally exist. The two-year delay from 1935 to 1937 in securing managerial acceptance of the constitutionality of the Act assured this.

Nonetheless, it was soon recognized that any means which would shorten the time required to investigate and decide cases should be considered. At first the Board investigated cases itself. This quickly gave way to the use of Trial Examiners who conducted hearings and reported their findings to the Board, together with a recommendation order as to the disposition of each case. However, these reports were neither binding nor final, and there was no requirement that the Board adopt the recommendations.

The Smith committee was the first Congressional body to recommend changes which would grant greater finality to the reports of the Trial Examiners. The Attorney General's Committee on Administrative Reform did likewise. These recommendations were incorporated in the Taft-Hartley changes in the Act. Presently, under section 10(c) of the Act, Trial Examiners' reports are final unless exceptions are filed within twenty days.

Another proposal to reduce delay, which was frequently mentioned in the 1950's, was to grant more authority to the States. This arose as a problem because of the existence of the power of Federal preemption of jurisdiction over labor disputes in industries in, or affecting, commerce. More particularly, the issue had been raised because of the failure of the Board to assert jurisdiction in certain types of cases, thus leaving a so-called "no man's land" between

State and Federal jurisdiction where neither union, employer, nor individual worker found any agency to whom to turn to for justice. To a degree, this problem was taken care of by the Landrum-Griffin Act (see below).

The Taft-Hartley Act took a step in the other direction, of delaying rather than expediting representation cases. This was done only in the interests of formalizing such proceedings and at the same time other steps were taken to attempt to accelerate such proceedings. But the sum total of the amendments appears to have been to create further delays.

Under the Wagner Act, the Regional Directors of the Board were allowed to proceed with representation cases without any authorization from the Board; their decisions were subject, however, to Board review. A variety of pre-hearing informal proceedings were adopted to expedite such cases and to avoid formal hearings and ordered elections.

The Taft-Hartley amendments prohibited such pre-hearing elections. Regional Directors were given the authority to obtain consent election agreements or to dismiss cases, but only where no new issues of policy were involved. However, despite these means of expediting representation cases, the problem of reducing the time required to certify a bargaining agent or determine that the workers in question do not desire such representation remains a continuing point of criticism of the Board.

The Task Force of the first Hoover Commission recommended in 1949 that pre-hearing elections again be legalized, but with an appeal allowed with the consent of the Regional Director or upon a motion of the Board. Other proposals would have given final authority to Regional Directors in representation cases, subject to review by the Board at will.

Probably the oldest and most persistent proposal to both (1) provide for the separation of the administrative and judicial functions of the Board and (2) expedite proceedings under the Act has been one to transfer jurisdiction over unfair labor practice cases to the Federal District Courts. We have noted above how early efforts to bring such cases before District Courts were rebuffed by the Supreme Court. Representative Anderson and Senator Burke introduced such proposals in the 76th Congress, 1st session in 1939 (H.R. 2761 and S. 1264). Similar proposals were introduced in the 80th Congress by Representative Hoffman (H.R. 880), and in the 81st Congress by Representative Landrum (H.R. 8246).

In 1953 the House Committee on Education and Labor recommended that the Board be divested of its judicial functions and allowed to handle only representation issues. Cases would be argued in the District Courts by attorneys. Parties who could not afford attorneys would be represented by a United States attorney.

Such proposals were supported by spokesmen for management, such as the National Association of Manufacturers and, on occasion, by the U.S. Chamber of Commerce. The feeling was that, if the Board were unable to reduce its backlog of cases, employers and employees should have the right to go directly to the courts to find justice.

However, substantial opposition was raised to these proposals. The courts were said to lack both the specialized knowledge and the experience needed to solve the technical issues. It was also pointed out that only a small portion of the courts' time could be devoted to the handling of NLRA cases. It was further noted that the dockets of the Federal District Courts were already overcrowded.

Along somewhat different lines, the House of Delegates of the American Bar Association in 1955 opposed such proposals because it felt that in labor cases there was a

need for centralized adjudication and for uniformity in case handling.

C. *Since Landrum-Griffin*

The Landrum-Griffin Act [22] included in Title VII several amendments to the Taft-Hartley Act. Only two of these had any substantial direct bearing on the administration of the Act. Both, interestingly enough, concerned administrative delays rather than dealing directly with the separation of functions.

Section 3(b) of the Act was amended to authorize the Board to delegate to its Regional Directors its powers to determine appropriate bargaining units, to investigate and conduct representation elections, and to certify unions for bargaining. The section provided that the Board may, on request of an interested party, review the actions of a Regional Director; but, unless the Board so specifies, such a review will not operate to stay the action taken by the Regional Director.

The other amendment was intended to close the jurisdictional gap we have noted above. Section 14(c) was added to the Act to give the States and their courts full jurisdiction over any dispute which the NLRB refuses to hear. The Board is empowered to broaden its jurisdiction to the fullest extent of the law, thus, potentially, giving it authority to deny almost any jurisdiction to the States; but the amendment prohibits the Board from reducing its jurisdictional standards below those asserted as of July 1, 1959.

The Board acted during 1961 to delegate its representational cases to the Regional Directors as authorized by the Landrum-Griffin Act, including decision whether a question concerning representation exists, determination of the appropriate bargaining unit, and the direction of elections to

[22] P.L. 257, 86th Congress (September 14, 1959).

determine whether employees wish union representation for collective bargaining purposes.

The action taken under the procedure by the Regional Directors are final and subject to discretionary review only on four grounds:

(1) Where a substantial question of law or policy is raised because of (a) the absence of, or (b) the departure from, officially reported precedent;

(2) Where a Regional Director's decision on a substantial factual issue is clearly erroneous, and such error prejudicially affects the rights of a party;

(3) Where the conduct of the hearing in an election case or any ruling made in connection with the proceeding has resulted in prejudicial error;

(4) Where there are compelling reasons for reconsideration of an important Board rule or policy.

This action was taken with a view to accomplishing a major speed-up in the handling of representation cases. The first results showed a drop in an average case-handling time, from filing to direction of election, from 113 days to 34 days. These results have been continued. While by 1966 the average had crept up to 40 days, and the number of such cases filed had continued to increase, cases closed in 1966 were at an all time high.

The situation with respect to unfair labor practice cases is quite different. In 1960, President Kennedy had appointed as his special assistant for regulatory agencies, James M. Landis, Dean of the Harvard Law School and former member of three regulatory boards: the Federal Trade Commission, the Securities and Exchange Commission, and the Civil Aeronautics Board. Dean Landis reviewed the work of all regulatory agencies of the government.

His report [23] recommended against any further separation of functions within such agencies. He recommended centering administrative responsibility for each agency in the chairman of its board, giving the board authority to delegate operating responsibility to panels, members or employees within the agency, subject to discretionary review. This was recommended for NLRB as well as the other agencies.

This report was one of several since 1959 which have examined the question of speeding up the settlement of unfair labor practice cases under the Act. The firm of McKinsey & Co. entered into a contract with the Board in 1958 to study its administrative procedures. Its final report made in January of 1959 addressed itself particularly to the problems of speeding up settlement of such cases.[24]

Its solution on the separation of functions was to give the General Counsel more independent authority, especially in administrative operations, subject only to final review of policy by the Board. It recommended that more of the authority of the Board should be delegated to organizational units within the Board. It also recommended that the decisions of Trial Examiners should be made final unless appealed on the basis of major points of law or Board policy.

A similar conclusion was reached by an Advisory Panel which reported to the Senate Committee on Labor and

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[23] U.S. Congress. Senate. Subcommittee on Administrative Practice. *Report on Regulatory Agencies to President-Elect*, 86th Congress, 2d session.

[24] The report is reprinted in the Pucinski subcommittee hearings. See U.S. Congress. House. Subcommittee on National Labor Relations Board, *Administration of the Labor-Management Relations Act by NLRB*, Appendix, Part 3, 87th Congress, 1st session.

Public Welfare in 1960.[25] Noting that controversies between the General Counsel and the Board had hampered enforcement, it proposed that the Board continue to serve as an adjudicatory agency, but that other administrative responsibility be given to an Administrator responsible for investigation of complaints and the prosecution of cases before the Board.

This panel also recommended that the reports of Trial Examiners be given a greater degree of finality. Review would be permitted only when the findings of fact by the Trial Examiner were clearly erroneous, when exceptions filed raised questions of law or policy, or when the Examiner had obviously not followed the usual course of administrative proceedings.

In May of 1961, President Kennedy submitted Reorganization Plan No. 5 to the Congress, with the support of the Board. The plan authorized the Board to delegate its functions, except those of adjudication and rule-making to a panel, an individual member of the Board, or a Board employee. The intent was to give the Trial Examiners of the Board authority to make final decisions, subject to Board review. The plan reserved to the Board the right to review any such decision or delegated action upon the motion of two or more Board members, either on their own initiative or in response to a request for review by a party or intervenor.

The plan met with opposition and, although favorably reported in the House (the resolution disapproving it was unfavorably reported), the plan was disapproved by a vote of 231 to 179 in July of 1961. Opponents of the plan insisted that it denied litigants the right of mandatory review.

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[25] U.S. Congress. Senate. Advisory Panel on Labor-Management Relations Law. *Organization and Procedure of the NLRB.* Report to Senate Committee on Labor and Public Welfare. Senate Document 81, 86th Congress, 2d session.

Supporters pointed out that the plan in no way affected the right of review by the courts, and that the plan was needed to expedite handling of the Board's case load.[26]

The problem of expediting the work of the Board has attracted other solutions. We have noted above proposals to transfer responsibility for unfair labor practice cases to the Federal District Courts. In 1955 the second Hoover Commission, in recommending the establishment of an Administrative Court of the United States, suggested that it contain a Labor Section to hear cases involving unfair labor practices.[27]

More recently, proposals have been made which would establish a separate Labor Court having such jurisdiction. Bills to this effect were introduced by Senator Hennings in the 85th Congress (S. 3797) and the 86th Congress (S. 1273). Senator Griffin introduced H.R. 11217 in the 1st session of the 89th Congress, while still a member of the House and S. 3631 in the 2d session, as Senator. He has reintroduced it as S. 1353 in the 90th Congress.

That there is a continuing need for expediting the work of the Board in settling unfair labor practice cases is made clear by examining the records of the Board. During fiscal year 1966 a record 15,933 unfair labor practice charges were filed, and 15,587 such cases were closed. The Office of the General Counsel issued 1,936 formal complaints of unfair labor practices, also a record. The 1966 record of 15,933 cases was three times the number filed in 1956, a 200-percent increase in ten years.[28]

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[26] U.S. Congress. House. Committee on Government Operations. *Approving Reorganization Plan No. 5 of 1961.* Report No. 576, 87th Congress, 1st session.

[27] *Op. cit.*, footnote 20.

[28] National Labor Relations Board. *Thirty-First Annual Report . . . for the Fiscal Year Ended June 30, 1966*, p. 3–6.

It should be noted that, while a majority of the charges filed are against employers, the trend is for the number of unfair labor practice charges against employers to fall and the charges of unfair labor practices against unions to rise. In 1965 the charges against employers numbered 10,931; in 1966, 10,902; charges against unions rose from 4,813 in 1965 to 4,941 in 1966. In 1966 there were 1,317 charges of illegal secondary boycotts filed against unions; in 1965 there had been 1,409 such charges.[29]

It should be noted that almost all of the formal consideration of the administrative problems of the Board given by the Congress in recent years has been directed to this problem of making the justice dispensed by the Board swift and sure. This was the burden of the Pucinski subcommittee report in 1961.[30] Allegations of such failure were made to the House committee on Education and Labor in 1965,[31] to the Thompson subcommittee of that Committee in 1966,[32] and again in 1967.[33]

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[29] *Idem.*

[30] U.S. Congress. House. Committee on Education and Labor. Subcommittee on the National Labor Relations Board. Report, *Administration of the Labor-Management Relations Act by the NLRB.* September 1961, 87th Congress, 1st session (1961).

[31] U.S. Congress. House. Committee on Education and Labor. Hearings, *Administration of the National Labor Relations Act,* 89th Congress, 1st session (1965).

[32] U.S. Congress. House. Committee on Education and Labor. Special Subcommittee on Labor. Hearings, *Review of the National Labor Relations Act,* 89th Congress, 2d session (1966).

[33] U.S. Congress. House. Committee on Education and Labor. Special Subcommittee on Labor. Hearings, *To Amend the National Labor Relations Act to Increase Effectiveness of Remedies,* 90th Congress, 1st session (1967).

III. THE ORIGINS OF THE ACT AND THE PROCEDURES OF THE BOARD

Like any historical fact, we tend to take for granted that the way things went was the way they had to go. The corollary for policy is that to get somewhere else you must start from where you now are.

Unfortunately, as far as labor-management policy is concerned, where we are now is in the midst of a legal morass into which we are slowly sinking. The problem is to get out and make a fresh start. But, first, it will be necessary to review briefly how we got there. For that we must go back beyond the Wagner Act to some most significant, but now largely forgotten, legislative and administrative history.

About all that survives in the public mind is that the origin of the Wagner Act was section 7(a) of the National Industrial Recovery Act, which had first guaranteed to the American workers the right to organize and bargain collectively. This Act, in turn, was the first major effort to restore the economy to its operating level of 1929.[34] When the NIRA was invalidated by the Supreme Court, the Wagner Act was enacted to salvage this portion of the law.

This is essentially correct, but it neglects the two-year interim, 1933–1935, in which operating experience was gained under the provisions of section 7(a) of the NIRA by no less than two nation-wide labor boards and countless industry boards.[35] It was during this time that the labor policy later embodied in the Wagner Act was hammered out and the method of its implementation conditioned by events. By 1935, the choices had been made. But in the interim, other choices were possible.

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[34] 48 U.S. Stat. 214 (June 16, 1933).

[35] For a history of these boards, see: Lewis L. Lerwin and Arthur Wubnig, *Labor Relations Boards*, Washington, D.C., The Brookings Institution, 1935.

In 1933 the fundamental labor problem facing the country was not union organization but reemployment and the restoration of the wage structure. "National Industrial Recovery" was the aim of that Act, to get the economy back to its level of operation in 1929. One essential part of that task was the restoration of purchasing power by raising wages and spreading employment.

The National Industrial Recovery Act provided for codes of fair competition in each industry. These were to contain standards, established by agreement between employers and employees, as to maximum hours of labor, minimum rates of pay, and such other conditions of employment as were necessary to accomplish the policy of the Act: ". . . to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry. . . ." [36]

The requirement for bargaining over the labor clauses of codes is contained in section 7(b) of the Act. Section 7(a) was included to assure implementation of section 7(b) by protecting the rights of the workers to organize so that they would have an organized voice in each industry in establishing the codes. Protection of the rights of workers to organize and bargain collectively, under the NIRA, was not so much an end in itself, as a means to a greater end of establishing a voluntarily planned economy, "a great spontaneous co-operation," as the President called it.

During the two years of operating experience under the Act, however, there came to be a general recognition that the apparatus set up was not working and, further, that recovery and restoration of purchasing power would be better attained by less comprehensive and less restrictive means. America's first, and so far only, general attempt

[36] *Op. cit.*, supra, section 1.

at comprehensive economic planning was collapsing into chaos, when it was ended by an adverse Supreme Court decision.[37]

The need for interpretation of the labor provisions of the NIRA first arose because of a need to interpret the President's Re-Employment Agreement. This "blanket code," the basis for the "Blue Eagle" drive to restore purchasing power, was issued on July 27, 1933. It was, in effect, a bilateral contract between the President and the individual employers accepting its provisions. These required an employer to eliminate child labor, limit hours of work, varying between 35 and 40 hours a week, fix minimum wages at from $12 to $15 a week, limit prices, and comply with the provisions of section 7(a) of the NIRA.

One result of the guarantee of the rights of workers to organize was a spreading number of strikes as employers resisted unionization. To meet this spreading strike wave, the President established, without specific legislative authority, the National Labor Board in August of 1933.

The original purpose of the Board was to mediate labor disputes. It soon found that this required interpreting the President's Reemployment Agreement. From this it was drawn into interpreting the labor provisions of the codes as they were established.

Given the combination of a dispute to settle and a body of law and regulation to interpret as a basis for the determination of the rights and responsibilities of the parties to the dispute, the Board came to exercise primarily quasi-judicial functions.

Thus, under this board and its successor, the first National Labor Relations Board, appointed pursuant to Public Resolution No. 44[38] in 1934, there was established a body of

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[37] *Schecter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

[38] 48 U.S. Stat. 1183 (June 19, 1934).

"common law," interpreting section 7(a) of the NIRA, and hammered out, case by case. The leading principles have been summarized as follows:

(1) It was unlawful for an employer to impose on his workers any scheme of collective bargaining against their will.

(2) Workers were lawfully free to choose between representation by trade unions or company unions.

(3) The government was to settle representation controversies by elections or by other means of ascertainment.

(4) The labor boards were to define appropriate units for collective bargaining in all cases where questions of this nature were raised.

(5) The labor organization which commanded a majority of the voters among the employees engaged within the collective bargaining unit was entitled to certification as the employees' representative.

(6) The employer was obliged to "recognize" representative labor organizations; that is, to negotiate with them in good faith.

(7) Employers and employee representatives alike were bound to "exert every reasonable effort" to make and maintain collective agreements.

(8) No employer was to lay off, discharge, or otherwise discipline his workers for their union membership or activities.[39]

The boards did not generally possess regulatory authority. That was in the hands of the code authorities, the National Recovery Administration officials, or the President. They entered the scene to handle dispute cases. They left it as quasi-judicial bodies, with four volumes of

[39] Lorwin and Wubnig, *op. cit.*, pp. 450–451.

decisions to their credit.[40] The National Labor Relations Board, established after the demise of the NIRA and these boards, took up where they had left off—as a quasi-judicial agency issuing decisions and making policy, case by case.

There is, however, one difference. The Wagner Act gave the Board regulatory authority. It was and is contained in section 6 of the Act. It has been used only for what are, generally speaking, procedural purposes, not to establish substantive regulatory requirements.

One initial reason for this was, of course, that the Board, like its predecessors, was so overwhelmed from its inception with individual cases that, once it had accepted that its role was also primarily quasi-judicial, it never had the time to sit down and codify policy.

There is another reason. When the Supreme Court invalidated the NIRA with the Schecter decision, it called in question the whole concept of Congressional delegation of authority. Thus, although the Wagner Act was based upon the Federal Trade Commission Act and although the Board was granted regulatory authority, it was reluctant to exercise such authority with vigor. It was even far from clear that Congress had any authority to regulate labor conditions in industries in interstate commerce. This question was not settled until 1937, as we have noted above.

IV. SOME MEANS OF REFORM

We began with a consideration of the operations of the National Labor Relations Board as a regulatory agency. We have shown that its operations have not only been subjected to a running fire of criticism for bias, coming from

[40] For decisions of these boards, see: *Decisions of the National Labor Board, August 1933—March 1934; April 1934—July 1934.* 2 v. (Washington, D.C., 1934); and *Decisions of the National Labor Relations Board, July 9, 1934—December 1934; December 1, 1934—June 16, 1935.* 2 v. (Washington, D.C., 1935).

both labor and management for thirty years, but that *there has been a growing, more fundamental criticism that its operations provide neither swift nor sure justice to labor or management.*

We have not been primarily concerned here with the charge of bias. As has been noted, the charges tend to nullify one another. It is also true that when the criticisms are examined one finds that they are seldom based on anything more than an analysis of a handful of cases; pieces of lawyers' briefs, not objective studies.[41]

What does the analysis suggest might be done to meet the more fundamental criticism? How can labor and management know better what is expected of each under the Labor-Management Relations Act? How can both secure justice, swift and sure, under its provisions?

On the question of the changing structure of the Board to speed its operations, little will be said here. As has been noted, some critics favor a greater internal centralization of authority, such as eliminating or curbing the General Counsel. Others favor greater decentralization, even to the extent of separating the administrative and judicial functions of the Board between two separate agencies, or an agency and the courts.

The problem is one of Congress delegating the correct amount of authority and insisting on its proper exercise. By whom it is to be exercised is, to a degree, a matter of judgment. In any event, the suggestions we shall make can be adapted to any type of administrative arrangement.

The examination which has been made suggests the conclusion that the main reason justice is delayed under the Act is because justice under the Act is not sure. The

[41] See article, referred to above, by Gene S. Booker and Alan Coe, "The NLRB and Its Critics," Labor Law Journal, v. 19, no. 9, September 1966.

Board has failed to make clear to labor and to management what it thinks the Act requires. It has created a lawyers' paradise and a legal nightmare of endless rows of case decisions. It makes policy by rummaging among these, selecting and modifying precedents to suit its current requirements.[42] And under our judicial procedure, this manufacture of policy by basing on, developing, and departing from prior precedent is accepted as being standard judicial practice, as, indeed, it is.

Thus, our study leads us to the conclusion, first, that the problem of speeding up the processes of the Board is not one of further expediting case outflow. Indeed, we are impressed with the fact that the existing Board has done a great deal—probably about as much as can be accomplished along these lines, given its existing powers. If Reorganization Plan No. 12 or the current Thompson bill, H.R. 11725, were put into effect, something more could be done to speed up unfair labor practice cases, but it would appear that representation cases were being handled about as rapidly as adequate consideration permits. Indeed, much of the current criticism of the Board for adopting such short-cuts to settlement of such cases as "card checks" appears to result from their efforts to speed up the handling of representation cases.

The solution would appear to be to cut down the case inflow. Quite clearly, the present procedures of the Board suggest to some elements of both labor and management that the processes of the Board can be used to *delay justice.* If one can distinguish one's case, find an appearance of

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[42] For studies of Board decisions suggesting that environmental factors at the time of decision play a role in influencing such decisions, see the two articles by Gene S. Booker and Cris L. Trafford, "The Predictability of NLRB Decisions," *Labor Law Journal*, v. 16, no. 7, July 1965; and "Environment and NLRB Bias," *Labor Law Journal*, v. 17, no. 4, April 1966.

factual or policy differences, one can, at worst, win delay; at best, win a decision favoring one's own position. Business men are, by definition, risk-takers. *The procedures of the Board are an invitation to take risks, with little fear of loss, and almost a certainty of a measure of gain.*

Our suggestion, and our second point, is that the Board should codify its opinions and reduce them to a series of regulatory bulletins. It does not have to make law, case by case. It could work out its policy, put it in the form of regulations, run them through the Administrative Procedure Act, and put them out for every member of labor and management to read. After thirty years they are, save for new situations, established. They need only be codified.

These bulletins will spell out for all to understand just what our labor policy is under the Act. The regulations could be followed up by the issuance of interpretative bulletins, informative releases, and, if desired (it is certainly needed), a nationwide informational campaign to tell labor and management of their rights and duties under the Act. It might thus fill the informational gap which exists today between the decisions of the Board and the very informative speeches, delivered only to small groups of labor experts, by the Board's members and the General Counsel.

By codifying its requirements, the Board would, of course, divest itself of much of its case load. An employer or a labor leader reading in a regulation what the Board expects will find he need consult his attorney only to make certain he is living up to the requirements of the law, not to find out what they are. The law should be made accessible to those who are required to live by it and whose rights depend upon its meaning. Employees and employers should not be required to go to court to find out what their rights are.

There is ample precedent for such a procedure. The Secretary of Labor, in administering the Fair Labor Standards Act, has, since its inception in 1938, not only put out regulations spelling out detailed requirements under the Act, but has also issued interpretative bulletins explaining the construction he will place on those sections of the Act where he lacks regulatory authority. These interpretations have been recognized by the Supreme Court as "providing a practical guide to employers and employees." Unlike Section 6 of the National Labor Relations Act, which grants *general regulatory authority* to the National Labor Relations Board, the Fair Labor Standards Act grants such authority only with respect to certain of its sections. The National Labor Relations Board could, however, issue such interpretations, which are, in effect, advisory opinions. Such opinions are also issued by the Department of Labor.

It should be noted that, although the language of Section 6 is clear enough, because the Board has seldom in the past issued any regulations with substantive content, and a minimum of procedural ones, *Congress might wish to consider indicating to the Board, in some formal manner, that it considered that the Board possessed this power, and that such power should be exercised.*

Two additional suggestions may be made. First, *Congress has not given the Board power to issue binding orders and decisions which would be self-enforcing.* If the Board spells out exactly how it intends to exercise its authority by issuing regulations and interpretations as suggested, Congress might consider granting this authority, which is commonly possessed by other regulatory agencies of the government. Congress will then know how it will be exercised.

Finally, Congress long ago took from the Board the power to consider its problems in any light other than a

narrowly legal one when it forbade it from making economic studies of labor-management relations and of the effects of its decisions. If the Board has been, at times, blind, it is in part because it was blinded. *Congress might consider specifically authorizing such studies.*

It is hoped that, in examining the problem of the separation of powers with respect to the Board, the Congress will look behind the surface charges to the basic truth that, in creating a regulatory commission, like the Board, Congress gives to it *a combination of powers,* a power of delegation which Congress alone possesses. This renders the function of Congressional oversight of the utmost importance. Only Congress can exercise effective oversight over a regulatory agency. Only Congress can correct an improper exercise of the powers it has delegated. Checks and balance do not work within such an agency, no matter how much formal separation of powers is written into the mandate. (Reprint from Daily Labor Report, Number 39, February 27, 1969.)

OPINION

SUPREME COURT OF THE UNITED STATES

No. 463.—October Term, 1968.

National Labor Relations Board, Petitioner, v. Wyman-Gordon Company.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 23, 1969.]

Mr. Justice Fortas announced the judgment of the Court and delivered an opinion in which The Chief Justice, Mr. Justice Stewart, and Mr. Justice White join.

On the petition of the International Brotherhood of Boilermakers and pursuant to its powers under § 9 of the National Labor Relations Act, 29 U. S. C. § 159, the National Labor Relations Board ordered an election among the production and maintenance employees of the respondent company. At the election, the employees were to select one of two labor unions as their exclusive bargaining representative, or to choose not to be represented by a union at all. In connection with the election, the Board ordered the respondent to furnish a list of the names and addresses of its employees who could vote in the election, so that the unions could use the list for election purposes. The respondent refused to comply with the order, and the election was held without the list. Both unions were defeated in the election.

The Board upheld the union's objections to the election because the respondent had not furnished the list, and the Board ordered a new election. The respondent again refused to obey a Board order to supply a list of employees, and the Board issued a subpoena ordering the respondent to provide the list or else produce its personnel and payroll records showing the employees' names and

addresses. The Board filed an action in the United States District Court for the District of Massachusetts seeking to have its subpoena enforced or to have a mandatory injunction issued to compel the respondent to comply with its order.

The District Court held the Board's order valid and directed the respondent to comply. 270 F. Supp. 280 (1967). The United States Court of Appeals for the First Circuit reversed. 397 F. 2d 394 (1968). The Court of Appeals thought that the order in this case was invalid because it was based on a rule laid down in an earlier decision by the Board, *Excelsior Underwear, Inc.*, 156 N. L. R. B. 1236 (1966), and the *Excelsior* rule had not been promulgated in accordance with the requirements that the Administrative Procedure Act prescribes for rule-making, 5 U. S. C. § 553. We granted certiorari to resolve a conflict among the circuits concerning the validity and effect of the *Excelsior* rule. 393 U. S. 932 (1968).[1]

I.

The *Excelsior* case involved union objections to the certification of the results of elections that the unions had lost at two companies. The companies had denied

[1] When we granted certiorari, the Fifth Circuit had expressly approved the procedure the Board followed in adopting the *Excelsior* rule. *Howell Refining Co.* v. *NLRB*, 400 F. 2d 213 (1968). Two other circuits had approved enforcement of the *Excelsior* rule without explicitly passing on the correctness of the method by which it was adopted. *NLRB* v. *Hanes Hosiery Division*, 384 F. 2d 188 (C. A. 4th Cir. 1967); *NLRB* v. *Roblen*, 385 F. 2d 52 (C. A. 7th Cir. 1967). After our grant of certiorari in the present case, three more Courts of Appeals explicitly upheld the *Excelsior* rule and the procedure by which it was adopted, *NLRB* v. *Beech-Nut Life Savers, Inc.*, — F. 2d — (C. A. 2d Cir. 1968); *British Auto Parts, Inc.* v. *NLRB*, — F. 2d — (C. A. 9th Cir. 1968); *NLRB* v. *Q-T Shoe Mfg. Co.*, — F. 2d — (C. A. 3d Cir. 1969); and the Fifth Circuit reaffirmed its earlier holding in *Howell Refining Co., Groendyke Transport, Inc.* v. *Davis*, — F. 2d — (1969).

to the unions a list of the names and addresses of employees eligible to vote. In the course of the proceedings, the Board "invited certain interested parties" to file briefs and to participate in oral argument of the issue whether the Board should require the employer to furnish lists of employees. 156 N. L. R. B., at 1238. Various employer groups and trade unions did so, as *amici curiae*. After these proceedings, the Board issued its decision in *Excelsior*. It purported to establish the general rule that such a list must be provided, but it declined to apply its new rule to the companies involved in the *Excelsior* case. Instead, it held that the rule would apply "only in those elections that are directed, or consented to, subsequent to 30 days from the date of [the] Decision." *Id.*, at 1240, n. 5.

Specifically, the Board purported to establish "a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties . . . , or after the Regional Director or the Board has directed an election . . . , the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." *Id.*, at 1239–1240.

Section 6 of the National Labor Relations Act empowers the Board "to make . . . , in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U. S. C. § 156. The Administrative Procedure Act contains specific provisions governing agency rule-making, which it defines as "an agency statement of general or particular applicability and fu-

ture effect," 5 U. S. C. § 551 (6).[1] The Act requires, among other things, publication in the Federal Register of notice of proposed rule-making and of hearing; opportunity to be heard; a statement in the rule of its basis and purposes; and publication in the Federal Register of the rule as adopted. See 5 U. S. C. § 553. The Board asks us to hold that it has discretion to promulgate new rules in adjudicatory proceedings, without complying with the requirements of the Administrative Procedure Act.

The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. See H. R. Rep. No. 1980, 79th Cong., 2d Sess., 21–26 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 13–16 (1945). They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act. The "rule" created in *Excelsior* was not published in the Federal Register which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the "hearing," whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested par-

[1] We agree with the opinion of Chief Judge Aldrich below that the *Excelsior* rule involves matters of substance and that it therefore does not fall within any of the Act's exceptions. See 5 U. S. C. § 553 (b) (A).

ties would have an opportunity to participate in the rule-making.

The Solicitor General does not deny that the Board ignored the rule-making provisions of the Administrative Procedure Act.[3] But he appears to argue that *Excelsior*'s command is a valid substantive regulation, binding upon this respondent as such, because the Board promulgated it in the *Excelsior* proceeding, in which the requirements for valid adjudication had been met. This argument misses the point. There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceedings, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule: *i. e.*, to exercise its quasi-legislative power.

Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See Friendly, The Federal Administrative Agencies 36–52 (1962).[4] They

[3] The Board has never utilized the Act's rule-making procedures. It has been criticised for contravening the Act in this manner. See, *e. g.*, 1 Davis, Administrative Law § 6.13 (Supp. 1967); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729 (1961).

[4] The Solicitor General argues that this Court has previously approved "rules" articulated by the Board in the adjudication of particular cases without questioning the propriety of that procedure. He cites *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945); *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324 (1946); *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344 (1953); and *Brooks* v. *NLRB*, 348 U. S. 96 (1954). In none of these cases has this Court ruled upon or sanctioned the exercise of quasi-legislative power—*i. e.*, rule-making—without compliance with § 6 of the NLRA and the rule-making provisions of the Administrative Procedure Act.

generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents. But this is far from saying, as the Solicitor General suggests, that commands, decisions, or policies announced in adjudication are "rules" in the sense that they must, without more, be obeyed by the affected public.

In the present case, however, the respondent itself was specifically directed by the Board to submit a list of the names and addresses of its employees for use by the unions in connection with the election.[5] This direction, which was part of the order directing that an election be held, is unquestionably valid. See, *e. g.*, *NLRB* v. *Waterman S. S. Co.*, 309 U. S. 206, 226 (1940). Even though the direction to furnish the list was followed by citation to *"Excelsior Underwear, Inc.*, 156 NLRB No. 111," it is an order in the present case that the respondent was required to obey. Absent this direction by the Board, the respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so.

Because the Board in an adjudicatory proceeding directed the respondent itself to furnish the list, the decision of the Court of Appeals for the First Circuit must be reversed.[6]

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[5] In his Decision and Direction of Election, the Regional Director ordered that "[a]n eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election . . ."

[6] MR. JUSTICE HARLAN'S dissent argues that because the Board improperly relied upon the *Excelsior* "rule" in issuing its order, we are obliged to remand. He relies on *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943). To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review

II.

The respondent also argues that it need not obey the Board's order because the requirement of disclosure of employees' names and addresses is substantively invalid. This argument lacks merit. The objections that the respondent raises to the requirement of disclosure were clearly and correctly answered by the Board in its *Excelsior* decision. All of the United States Courts of Appeals that have passed on the question have upheld the substantive validity of the disclosure requirement,[7] and the court below strongly intimated a view that the requirement was substantively a proper one, 397 F. 2d, at 396.

We have held in a number of cases that Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives. See, *e. g.*, *NLRB* v. *Waterman S. S. Co.*, *supra*, at 226; *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946). The disclosure requirement furthers this objective by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present.

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of agency action into a ping-pong game. In *Chenery*, the Commission had applied the wrong standards to the adjudication of a complex factual situation, and the Court held that it would not undertake to decide whether the Commission's result might have been justified on some other basis. Here, by contrast, the substance of the Board's command is not seriously contestable. There is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand.

[7] See *NLRB* v. *J. P. Stevens & Co.*, — F. 2d — (C. A. 4th Cir. 1969), and the cases cited in n. 1, *supra*.

III.

The respondent contends that even if the disclosure requirement is valid, the Board lacks power to enforce it by subpoena. Section 11 (1) of the National Labor Relations Act provides that the Board shall have access to "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question," and empowers the Board to issue subpoenas "requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation." Section 11 (2) gives the district courts jurisdiction, upon application by the Board, to issue an order requiring a person who has refused to obey the Board's subpoena "to appear before the Board . . . there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question . . . ." 29 U. S. C. §§ 161 (1)–(2).

The respondent takes the position that these statutory provisions do not give the Board authority to subpoena the lists here in question because they are not "evidence" within the meaning of the statutory language. The District Court held, however, that "in the context of § 11 of the Act, 'evidence' means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation."[3] The courts of appeals that have passed on the question have construed the term "evidence" in a similar manner. *NLRB* v. *Hanes Hosier Division*, 384 F. 2d 188, 191–192 (C. A. 4th Cir. 1967). See *NLRB* v. *Rohlen*, 385 F. 2d 52, 55–58 (C. A. 7th Cir. 1967); *NLRB* v. *Beech-Nut Life Savers, Inc.*, — F. 2d —, — — — (C. A. 2d Cir. 1968); *British Auto Parts, Inc.*

[3] The Court of Appeals did not reach the issue whether the Board could subpoena the lists in question.

v. *NLRB*, — F. 2d —, — - - — (C. A. 9th Cir. 1968); *NLRB* v. *Q-T Shoe Mfg. Co.*, — F. 2d — (C. A. 3d Cir. 1969). We agree that the list here in issue is within the scope of § 11 so that the Board's subpoena power may be validly exercised.

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with directions to reinstate its judgment.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 463.—October Term, 1968.

National Labor Relations Board, Petitioner, v. Wyman-Gordon Company. | On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 23, 1969.]

Mr. Justice Black, with whom Mr. Justice Brennan and Mr. Justice Marshall join, concurring in the result.

I agree with Parts II and III of the prevailing opinion of Mr. Justice Fortas, holding that the *Excelsior* requirement[1] that an employer supply the union with the names and addresses of its employees prior to an election is valid on its merits and can be enforced by a subpoena. But I cannot subscribe to the criticism in that opinion of the procedure followed by the Board in adopting that requirement in the *Excelsior* case, 156 N. L. R. B. 1236 (1966). Nor can I accept the novel theory by which the opinion manages to uphold enforcement of the *Excelsior* practice in spite of what it considers to be statutory violations present in the procedure by which the requirement was adopted. Although the opinion is apparently

[1] This requirement first announced in the *Excelsior* case, 156 N. L. R. B. 1236 (1966), has often been referred to by both the Board, the lower courts, and the commentators as "the *Excelsior* rule." I understand the use of the word "rule" in this context to imply simply that the requirement is a rule of law such as would be announced in a court opinion and not necessarily that it is the kind of "rule" required to be promulgated in accordance with the "rule making" procedures of the Administrative Procedure Act. For the sake of clarity, however, I have chosen in this opinion to avoid use of the word "rule" when referring to the procedure required by the *Excelsior* decision.

intended to rebuke the Board and encourage it to follow the plurality's conception of proper administrative practice, the result instead is to free the Board from all judicial control whatsoever regarding compliance with procedures specifically required by applicable federal statutes such as the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, and the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* Apparently, under the prevailing opinion, courts must enforce any requirement announced in a purported "adjudication" even if it clearly was not adopted as an incident to the decision of a case before the agency, and must enforce "rules" adopted in a purported "rule making" even if the agency materially violated the specific requirements that Congress has directed for such proceedings in the Administrative Procedure Act. I for one would not give judicial sanction to any such illegal agency action.

In the present case, however, I am convinced that the *Excelsior* practice was adopted by the Board as a legitimate incident to the adjudication of a specific case before it, and for that reason I would hold that the Board properly followed the procedures applicable to "adjudication" rather than "rule making." Since my reasons for joining in reversal of the Court of Appeals differ so substantially from those set forth in the prevailing opinion, I will spell them out at some length.

Most administrative agencies, like the Labor Board here, are granted two functions by the legislation creating them: (1) the power under certain conditions to make rules having the effect of laws, that is, generally speaking, quasi-legislative power; and (2) the power to hear and adjudicate particular controversies, that is quasi-judicial power. The line between these two functions is not always a clear one and in fact the two functions merge at many points. For example, in exercising its quasi-judicial function an agency must frequently

decide controversies on the basis of new doctrines, not theretofore applied to a specific problem, though drawn to be sure from broader principles reflecting the purposes of the statutes involved and from the rules invoked in dealing with related problems. If the agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power, and both an adjudicatory order and a formal "rule" are alike subject to judicial review. Congress gave the Labor Board both of these separate but almost inseparably related powers.[2] No language in the National Labor Relations Act requires that the grant or the exercise of either power was intended to exclude the Board's use of the other.

Nor does any language in the Administrative Procedure Act require such a conclusion. The Act does specify the procedure by which the rule-making power is to be exercised, requiring publication of notice for the benefit of interested parties and provision of an opportunity for them to be heard, and after establishment of a rule as provided in the Act, it is then to be published in the Federal Register. Congress had a laudable purpose in prescribing these requirements, and it was evidently contemplated that administrative agencies like the Labor Board would follow them when setting out to announce a new rule of law to govern parties in the future. In this same statute, however, Congress also conferred on the effected administrative agencies the power to proceed by adjudication, and Congress specified a distinct procedure by which this adjudicatory power is to be exercised.[3] The Act defines "adjudication" as

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[2] See National Labor Relations Act §§ 6, 9 (c) (1), 10; 29 U. S. C. §§ 156, 159 (c) (1), 160.

[3] The procedure to be followed in "adjudication," which includes notice of the issues, an opportunity for responsive pleadings, a hearing, and decision, is specified in 5 U. S. C. §§ 554, 556, and 557. The

"agency process for the formulation of an order," and "order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U. S. C. §§ 551 (7), (6). Thus, although it is true that the adjudicatory approach frees an administrative agency from the procedural requirements specified for rule making, the Act permits this to be done whenever the action involved can satisfy the definition of "adjudication" and then imposes separate procedural requirements that must be met in adjudication. Under these circumstances, so long as the matter involved can be dealt with in a way satisfying the definition of either "rule making" or "adjudication" under the Administrative Procedure Act, that Act, along with the Labor Relations Act, should be read as conferring upon the Board the authority to decide, within its informed discretion, whether to proceed by rule making or adjudication. Our decision in *Securities Comm'n* v. *Chenery Corp.*, 332 U. S. 194 (1947), though it did not involve the Labor Board or the Administrative Procedure Act, is therefore equally applicable here. As we explained in that case, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.*, at 203.

In the present case there is no dispute that all the procedural safeguards required for "adjudication" were fully satisfied in connection with the Board's *Excelsior* decision, and it seem plain to me that that decision did constitute "adjudication" within the meaning of the

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Administrative Procedure Act expressly exempts proceedings for "the certification of worker representatives" from there requirements, 5 U. S. C. §§ 554 (a)(6), 556 (a), 557 (a), and these proceedings are therefore governed only by the requirements specified in the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*

Administrative Procedure Act, even though the requirement was to be prospectively applied. See *Great Northern R. Co.* v. *Sunburst Co.*, 287 U. S. 358 (1932). The Board did not abstractly decide out of the blue to announce a brand new rule of law to govern labor activities in the future, but rather established the procedure as a direct consequence of the proper exercise of its adjudicatory powers. Sections 9 (c)(1) and (2) of the Labor Relations Act empower the Board to conduct investigations, hold hearings, and supervise elections to determine the exclusive bargaining representative that the employees wish to represent them. This is a key provision of the plan Congress adopted to settle labor quarrels that might interrupt the free flow of commerce. A controversy arose between the Excelsior Company and its employees as to the bargaining agent the employees desired to act for them. The Board's power to provide the procedures for the election was invoked, an election was held, and the losing unions sought to have that election set aside. Undoubtedly the Board proceeding for determination of whether to confirm or set aside that election was "agency process for the formulation of an order" and thus was "adjudication" within the meaning of the Administrative Procedure Act.

The prevailing opinion seems to hold that the *Excelsior* requirement cannot be considered the result of adjudication because the Board did not apply it to the parties in the *Excelsior* case itself, but rather announced that it would be applied only to elections called 30 days after the date of the *Excelsior* decision. But the *Excelsior* order was nonetheless an inseparable part of the adjudicatory process. The principal issue before the Board in the *Excelsior* case was whether the election should be set aside on the ground, urged by the unions, that the employer had refused to make the employee lists available to them. See 156 N. L. R. B., at 1236–1238. The

Board decided that the election involved there should not be set aside, and thus rejected the contention of the unions. In doing so, the Board chose to explain the reasons for its rejection of their claim, and it is this explanation, the Board's written opinion, which is the source of the *Excelsior* requirement. The Board's opinion should not be regarded as any less an appropriate part of the adjudicatory process merely because the reason it gave for rejecting the unions' position was not that the Board disagreed with them as to the merits of the disclosure procedure but rather, see 156 N. L. R. B., at 1239, 1240, n. 5, that while fully agreeing that disclosure should be required, the Board did not feel that it should upset the Excelsior Company's justified reliance on previous refusals to compel disclosure by setting aside this particular election.

Apart from the fact that the decisions whether to accept a "new" requirement urged by one party and, if so, whether to apply it retroactively to the other party are inherent parts of the adjudicatory process, I think the opposing theory accepted by the Court of Appeals and by the prevailing opinion today is a highly impractical one. In effect, it would require an agency like the Labor Board to proceed by adjudication only when it could decide, *prior* to adjudicating a particular case, that any new practice to be adopted would be applied retroactively. Obviously, this decision cannot properly be made until all the issues relevant to adoption of the practice are fully considered in connection with the final decision of that case. If the Board were to decide, after careful evaluation of all the arguments presented to it in the adjudicatory proceeding, that it might be fairer to apply the practice only prospectively, it would be faced with the unpleasant choice of either starting all over again to evaluate the merits of the question, this time in a "rule-making" proceeding, or overriding the con-

sideratons of fairness and applying its order retroactively anyway, in order to preserve the validity of the new practice and avoid duplication of effort. I see no good reason to impose any such inflexible requirement on the administrative agencies.

For all of the foregoing reasons I would hold that the Board acted well within its discretion in choosing to proceed as it did, and I would reverse the judgment of the Court of Appeals on this basis.

SUPREME COURT OF THE UNITED STATES

No. 463.—October Term, 1968.

National Labor Relations Board, Petitioner, *v.* Wyman-Gordon Company.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 23, 1969.]

Mr. Justice Douglas, dissenting.

The Administrative Procedure Act, 5 U. S. C. § 553 (b) provides that general notice "of proposed rule making" shall be published in the Federal Register. Public participation—in essence a hearing—is provided, § 553 (c). And "interested" persons are given the right to petition for the issuance, amendment, or repeal of a rule, 5 U. S. C. § 553 (e).

In *Excelsior Underwear, Inc.*, 156 N. L. R. B. 1236, the Board in 1966 decided (1) that an employer would be required to furnish the Regional Director, prior to the conducting of a representation election, the names and addresses of the eligible voters, which list would then be made available to all contestants in the election, but that (2) that this requirement would apply only prospectively, to all elections directed or consented to subsequent to 30 days after the date of its decision there.

The notice and hearing procedure prescribed by § 553 (b) was not followed; and in this case, an election was directed seven months after the *Excelsior* decision, the Board applying the *Excelsior* rule.

I am willing to assume that, if the Board decided to treat each case on its special facts and perform its adjudicatory function in the conventional way, we should have no difficulty in affirming its action. The difficulty is that it chose a different course in the *Excelsior* case

and having done so, it should be bound to follow the procedures prescribed in the Act as my Brother HARLAN has outlined them. When we hold otherwise, we let the Board "have its cake and eat it too."

The Committee reports make plain that the Act "provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies." S. Rep. No. 752, 79th Cong., 1st Sess., p. 7; H. R. Rep. No. 1980, 79th Cong., 2d Sess., p. 17.

Section 553 (b)(3) provides in part:

> "Except when notice or hearing is required by statute, this subsection does not apply—
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> "(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."

We need not stop to inquire what the word "procedure" in that context embraces. For § 553 (d) provides, with exceptions not material[1] here that:

> "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date. . . ."

The Board apparently decided the *Excelsior* case with § 553 (d) in mind, for it made the proposed new rule effective in 30 days. The House report states that § 553 (d) (which was § 4 (c) in its draft) "does not

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[1] The rule-making provision does not apply to

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U. S. C. § 553 (a).

These exceptions exclude, *inter alia*, the National Forest Service, the National Park System, the Bureau of Land Management, and other agencies dealing with "public property" such as the Interior Department and its leases of off-shore oil properties.

For a compilation of federal agency rules on rule-making see Pike and Fisher, Administrative Law (2d series 1951).

provide procedures alternative to notice and other public proceedings required by the prior sections." *Id.*, p. 259. And that report added, "It will afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt." *Id.*, p. 259. And see S. Rep., *op. cit., supra,* p. 201.

The "substantive" rules described by § 553 (d) may possibly cover "adjudications," even though they represent performance of the "judicial" function. But it is no answer to say that the order under review was "adjudicatory." For as my Brother HARLAN says, an agency is not adjudicating when it is making a rule to fit future cases. A rule like the one in *Excelsior* is designed to fit all cases at all times. It is not particularized to special facts. It is a statement of far-reaching policy covering all future representative elections.

It should therefore have been put down for the public hearing prescribed by the Act.

The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that are forthcoming. It gives an opportunity for persons affected to be heard. Recently the proposed Rules of the Federal Highway Administration governing the location and design of freeways, 33 Fed. Reg. 15663, were put down for a hearing; and the Governor of every State appeared or sent an emissary. The result was a revision of the Rules before they were promulgated. 34 Fed. Reg. 727.

That is not an uncommon experience. Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. See Friendly, The Federal Administration Agencies, p. 45 (1962).

This is a healthy process that helps make a society viable. The multiplication of agencies and their growing

power makes them more and more remote from the people affected by what they do and makes more likely the arbitrary exercise of their powers. Public airing of problems through rulemaking makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.

Many federal agencies touch on numerous aspects of the lives of the poor. Rulemaking for this group is discussed in Bonfield, Representation for the Poor in Federal Rulemaking, 67 Mich. L. Rev. 511, 512:

> "An agency promulgating rules affecting the poor cannot assume that it automatically knows what is best for such people. Government administrators are usually persons with middle-class backgrounds, experiences, and associations; therefore, they tend to have middle-class viewpoints, orientations, and understandings. This means that the personnel of federal agencies may be expected to reflect more accurately the interests of the affluent than those of the economically underprivileged. Consequently, there is a special reason for concern when, as is now the case, the interests of poor people are inadequately represented in the rulemaking process."

While that suggestion may not be relevant to the present labor-management area and the sophisticated opponents with which this case is concerned, it does illustrate that when we are lax and allow federal agencies to play fast and loose with rulemaking, we set a precedent with dangerous repercussions.

It has been stated that "the survival of a questionable rule seems somewhat more likely when it is submerged in the facts of a given case" than when rulemaking is used. See Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 946–947 (1965). Moreover,

"agencies appear to be freer to disregard their own prior decisions than they are to depart from their regulations." *Id.*, p. 947. Failure to make full use of rulemaking power is attributable at least in part "to administrative intertia and reluctance to take a clear stand." *Id.*, p. 972.

Rulemaking is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action.

I would hold the agencies governed by the rulemaking procedure strictly to its requirements and not allow them to play free and loose as the National Labor Relations Board apparently likes to do.[2]

As stated by the Court of Appeals, the procedure used in the *Excelsior* case plainly flouted the Act:

> "Recognizing the problem to be one affecting more than just the parties before it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days. In so doing we consider that the Board, to put it bluntly, designed its own rule-making procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest." 397 F. 2d 394, 396–397.

I would affirm the judgment.

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[2] "The NLRB has never used its rule-making power; it misuses the methods of adjudication for making rules, and it uses press releases not published in the Federal Register, for announcing policies that ought to be embodied in formal rules. It seems to be violating § 3 and § 4 of the Administrative Procedure Act, and the result in some instances is serious injustice." 1 Davis, Administrative Law § 6.13 (1967 Supp.). And see Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729 (1961).

SUPREME COURT OF THE UNITED STATES

No. 463.—October Term, 1968.

National Labor Relations Board, Petitioner, v. Wyman-Gordon Company.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April 23, 1969.]

Mr. Justice Harlan, dissenting.

The language of the Administrative Procedure Act does not support the Government's claim that an agency is "adjudicating" when it announces a rule which it refuses to apply in the dispute before it. The Act makes it clear that an agency "adjudicates" only when its procedures result in the "formulation of an *order*." 5 U. S. C. § 551 (7). (Emphasis supplied.) An "order" is defined to include "The whole or *part* of a final disposition . . . of an agency *in a matter other than rule making*. . . ." 5 U. S. C. § 551 (6). (Emphasis supplied.) This definition makes it apparent that an agency is not adjudicating when it is making a rule, which the Act defines as "an agency statement of general or particular applicability and *future effect*. . . ." 5 U. S. C. § 551 (4). (Emphasis supplied.) Since the Labor Board's *Excelsior* rule was to be effective only 30 days after its promulgation, it clearly falls within the rule-making requirements of the Act.[1]

Nor can I agree that the natural interpretation of the statute should be rejected because it requires the agency

[1] For the reasons advanced by Chief Judge Aldrich in his opinion below, — F. 2d —, I think it clear that the *Excelsior* rule involves matters of substance and not procedure, and so does not fall within the exception created by 5 U. S. C. § 553 (b)(A) of the Act.

to choose between giving its rules immediate effect or initiating a separate rule-making proceeding. An agency chooses to apply a rule prospectively only because it represents such a departure from pre-existing understandings that it would be unfair to impose the rule upon the parties in pending matters. But it is precisely in these situations, in which established patterns of conduct are revolutionized, that rule-making procedures perform the vital functions that my Brother DOUGLAS describes so well in a dissenting opinion with which I basically agree.

Given the fact that the Labor Board has promulgated a rule in violation of the governing statute, I believe that there is no alternative but to affirm the judgment of the Court of Appeals in this case. If, as the plurality opinion suggests, the NLRB may properly enforce an invalid rule in subsequent adjudications, the rule-making provisions of the Administrative Procedure Act are completely trivialized. Under today's prevailing approach, the agency may evade the commands of the Act whenever it desires and yet coerce the regulated industry into compliance. It is no answer to say that "respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so," *ante*, at 6, when the Labor Board was threatening to issue a subpoena which the courts would enforce. In what other way would the administrative agency compel obedience to its invalid rule?

One cannot always have the best of both worlds. Either the rule-making provisions are to be enforced or they are not. Before the Board may be permitted to adopt a rule that so significantly alters pre-existing labor-management understandings, it must be required to conduct a satisfactory rule-making proceeding, so that it will have the benefit of wide-ranging argument before it enacts its proposed solution to an important problem.

In refusing to adopt this position, the prevailing opinion does not only undermine the Administrative Procedure Act, but also compromises the most basic principles governing judicial review of agency action established in our past decisions. This Court's landmark opinion in *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943), makes it clear that we are obliged to remand a case if the agency has relied upon an improper reason to justify its action:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order cannot stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

Chenery's teachings are applicable here. The Regional Office that issued the order under review refused to consider the merits of the arguments against the *Excelsior* rule which were raised by Wyman-Gorman on the ground that they had been rejected by the Board in the *Excelsior* case itself:

> ". . . it is well known that *Excelsior* issued only after oral argument and briefs, including *amicus curiae* briefs by interested parties. The Board has considered arguments such as those made here and nevertheless established the requirement embodied in *Excelsior* and the undersigned [Acting Regional Director] is bound by it." Appendix, p. 33.

The Board denied review of this decision on the ground that "it raises no substantial issues warranting review." Appendix, p. 35.

Since the major reason the Board has given in support of its order is invalid, *Chenery* requires remand. See also *Bell* v. *United States*, 366 U. S. 393, 412–413 (1961); *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 167–168 (1962); cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 196–197 (1941). The prevailing opinion explains its departure from our leading decisions in this area on the ground that "There is not the slightest uncertainty as to the outcome of [this] proceeding" on remand. *Ante*, at 7, n. 6. I can perceive no justification whatever for this assertion. Since the *Excelsior* rule was invalidly promulgated, it is clear that, at a minimum, the Board is obliged on remand to recanvass all of the competing considerations before it may properly announce its decision in this case.[2] We cannot know what the outcome of such a reappraisal will be. Surely, it cannot be stated with any degree of certainty that the Board will adopt precisely the same solution as the one which was embraced in *Excelsior*. The plurality simply usurps the function of the National Labor Relations Board when it says otherwise.

I would affirm the judgment of the Court of Appeals.

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[2] As I have indicated, *supra*, at 2, I would go further and require the Board to initiate a new rule-making proceeding where, as here, it has previously recognized that the proposed new rule so departs from prior practices that it cannot fairly be applied retroactively. In the absence of such a proceeding, the administrative agency must be obliged to follow its earlier decisions which did not require employers to furnish *Excelsior* lists to unions during organizing campaigns.